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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 504

JOSEPH F. SCHIPANI,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 382—September Term, 1965.

(Argued May 12, 1966 Decided June 29, 1966.)

Docket No. 30256

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOSEPH F. SCHIPANI,

Defendant-Appellant.

Before:

WATERMAN, MOORE and ANDERSON,

Circuit Judges.

Appeal from judgment of conviction in the United States District Court for the Eastern District of New York, George Rosling, *Judge,* sitting without a jury, on five counts of an indictment, each charging willful evasion of personal income taxes in violation of Title 26 U.S.C. §7201. Affirmed.

JEROME C. DITORE, Assistant U. S. Attorney, Eastern District of New York (Joseph P. Hoey, U. S. Attorney, Eastern District of New York, on the brief), *for Appellee.*

JACOB P. LEFKOWITZ, Esq., New York, New York, *for Defendant-Appellant.*

Appendix A—Opinion of United States Court of Appeals

ANDERSON, *Circuit Judge*:

The defendant-appellant was convicted on all five counts of an indictment charging him with violations of Title 26 U. S. C. §7201 [1] for willfully evading the payment of personal income taxes due from him for the five calendar years 1956 through 1960. He was fined $2500 and sentenced to three years imprisonment on each count, to be served concurrently, but with the proviso that he should not be released from confinement until the fines had been fully paid.

The case was tried on the "net worth" theory, in support of which the Government offered evidence to prove that Schipani had a certain net worth at the beginning of 1956 and an increase in net worth at the end of that year and at the end of each succeeding calendar year during the indictment period. The proof was entirely circumstantial because Schipani kept no records, did not file any income tax return at all for any of the years covered by the indictment, and did not furnish the Government with any leads with regard to any cash reserve, income or expenses.

An essential element of a case of this kind is proof of the opening net worth of the accused as it was at the beginning of the indictment period. *Holland* v. *United States*, 348 U. S. 121, 132 (1954). The Government offered as a basis or starting point for this phase of its case a statement made by the defendant in 1943 concerning his cash resources at that time, thirteen years before the indictment. In that year Schipani had been convicted of an offense and commenced serving one and a half years of a two year term of imprisonment. On February 10, 1943, in the course

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[1] Title 26 U. S. C. §7201, in pertinent part, reads as follows:

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony . . .".

of a routine interrogation by the prison authorities relating to Schipani's personal history and circumstances at the time he was admitted to the prison, he started that the only cash he then had was $1350 which he had left with his wife. The trial court found this to be true; and it also found, from evidence of Schipani's financial dealings and affairs from that time to and including December 31, 1955, that Schipani had assets on January 1, 1956 of $18,908.89 and liabilities of $1300 from which it computed a net worth of $17,608.89 at the beginning of the indictment period. The trial court further found that, at the end of the calendar year 1956, the defendant had an increase in his net worth of $7,307.35, and in each of the four subsequent indictment years there was likewise an increase in the defendant's net worth.[2]

The findings state, and the evidence clearly showed, that the Government made an exhaustive investigation into virtually every possible source of information concerning Schipani's economic circumstances from January, 1943 through December, 1960. The leads obtained from checking over one hundred central and branch bank offices in areas in which Schipani lived and which he frequented, finance companies and credit bureaus, various insurance, retail and brokerage firms, records of Kings County and the New York Surrogate Courts and the Estate and Gift Tax Office of the United States were followed through by investigators. The

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[2]

	Net Worth	Net Worth Previous Year End	Increase in Net Worth
12/31/55	$17,608.89		
12/31/56	24,916.24	$17,608.89	$7,307.35
12/31/57	28,933.05	24,916.24	4,016.81
12/31/58	33,979.11	28,933.05	5,046.06
12/31/59	38,353.30	33,979.11	4,374.19
12/31/60	39,245.26	38,353.30	891.96

Government also sought out and questioned friends and relatives of the appellant for further leads which were then pursued. The information thus obtained furnished the proof presented in the Government's case.

The cash on hand at the end of one year and the beginning of the next, however, was only one of the items entering into the total of the assets at that time. The unadjusted net worth was simply the result of subtracting the total liabilities at the time from the total assets. The court below found that the initial cash of $1350 in 1943 had been consumed; and it was assumed, on the basis of the presumption of innocence that, because Schipani filed no income tax returns for the years 1943 through 1955, he never (except for a very small amount in 1945) in any of those years had a yearly gross income in excess of the amount which would have required him to file a return. His expenditures, however, were greatly in excess of such amounts of income.[3] It was, therefore, found that the cash on hand at the beginning of the indictment period, January 1, 1956, was zero.[4]

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[3] Expenditures were made by defendant during the years 1943 through 1955 of the following amounts segregated by calendar years.

1943	$1,203.47	1949	$3,691.73
1944	1,145.60	1950	3,528.62
1945	1,145.34	1951	3,804.05
1946	1,164.64	1952	4,912.86
1947	8,694.02	1953	3,776.71
1948	3,138.80	1954	4,646.71
		1955	7,079.72

[4] Funds available to defendant on December 31 of each of the years in the period from 1/1/43 to 12/31/55 segregated by calendar years were as follows:

12/31/1943	$1,146.52
12/31/1944	955.91
12/31/1945	442.76
12/31/1946/1955	—0—

The other items of assets, which on that date were found to total $18,908.89,[5] consisted of two savings accounts in the Flatbush Savings Bank, an investment in United States Savings Bonds, real estate, and a 1955 Ford automobile. From this amount was subtracted a loan and a mortgage note totaling $1300. In the subsequent indictment years, 1957 through 1960, the total asset figures reflect purchases of stock, furniture, and a boat as well as increases in the existing savings bank accounts and the opening of two additional small savings bank accounts. The liability total, which was deducted from the total value of the assets in each of the years, also reflected additional increases in liabilities, most of which were associated with major asset purchases during the same years.[6]

The Government in its proof and the trial court in its findings, in arriving at the opening net worth and in calculating the net increase in net worth for each of the indictment years, also made certain adjustments. The findings show that additions to the unadjusted figure included non-

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5 Defendant's total assets at the beginning and end of each indictment year were approximately as follows:

1/1/56 (12/31/55)	$18,908.89	12/31/56	$37,806.52
1/1/57	37,806.52	12/31/57	38,897.48
1/1/58	38,897.48	12/31/58	44,447.77
1/1/59	44,447.77	12/31/59	45,589.33
1/1/60	45,589.33	12/31/60	45,273.58

6 Defendant's total liabilities at the beginning and end of each indictment year were approximately as follows:

1/1/56 (12/31/55)	$ 1,300.00	12/31/56	$12,890.28
1/1/57	12,890.28	12/31/57	9,964.43
1/1/58	9,964.43	12/31/58	10,468.66
1/1/59	10,468.66	12/31/59	7,236.03
1/1/60	7,236.03	12/31/60	6,028.32

capital expenditures[7] and the non-deductible losses on the sale of personal property. The latter were included in arriving at the 1956 net worth and the 1960 net worth. The loss for each of these years was treated as the equivalent of an expenditure, which explains the differences between "total expenditures" and "additions to net worth" for each of those years, whereas those items in the other three years (1957-1959, inclusive) are exactly the same. The deductions made from the unadjusted net worth, reflect the dividends-received exclusion in each of the indictment years, the proceeds of a paid up life insurance policy in 1959, and refunds from the receiver of taxes and a realty company.[8]

The defense offered no evidence and the principal issue at the trial was the sufficiency of the Government's case. The trial court concluded that the Government had proven

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7 The total expenditures for each of the indictment years were as follows:

1956	$ 7,339.09
1957	9,135.45
1958	10,316.66
1959	17,432.93
1960	10,289.32

8

	Increase in Net Worth before adjustment (Exh. 281)	Adjustments to Net Worth (Exh. 285)		
		Additions	Deductions	Gross Income
1956	$7,307.35	$ 8,553.09	$ 61.52	$15,798.92
1957	4,016.81	9,135.45	96.79	13,055.47
1958	5,046.06	10,316.66	37.08	15,325.64
1959	4,374.19	17,432.93	1,084.19	20,722.93
1960	891.96	12,080.23	59.20	12,912.99

beyond a reasonable doubt that Schipani had a gross income in each of the indictment years considerably in excess of the amount which required him to file an income tax return, that income taxes were due for each of those years and that the defendant willfully sought to evade the payment of the taxes by filing no return for any of the years in question. We affirm.

The appellant has presented a number of points on appeal, most of which attack the proof of "opening net worth" as insufficient to establish a prima facie case and which also attack, as inadequate for proof beyond a reasonable doubt, the evidence offered to show the increases in net worth, particularly as they were allocated to each separate tax year.

The only issue raised on the admissibility of evidence concerns the denial of the defendant's pre-trial motion and the overruling at the trial of his objection to the prison record of what Schipani said to the prison official in February of 1943 that he had only $1350 in cash which he had left with his wife. The appellant argues here, as he did below, that this violated his Fourth Amendment right because the report was the product of an unreasonable search and seizure and his Fifth Amendment right because it was an involuntary and incriminating statement. We agree with the trial judge, however, that as far as the Fourth Amendment is concerned, this routine taking down of relevant information as part of the regular prison procedure in setting up the personal record of an inmate, unrelated to any pending investigation of a criminal offense, is not an unreasonable search or seizure of appellant's "person, house, papers and effects." Schipani made a voluntary re-

sponse to a question asked him under circumstances which bore no conceivable relationship to the procuring of an inculpatory statement by police or prosecuting officials in connection with any criminal activity, particularly to the present case which was not thought of or initiated until many years later. It, therefore, furnishes no basis for a claim of lack of due process under the Fifth Amendment.

With regard to the Government's proof that there was virtually no cash in the defendant's hands as part of his assets as that bore upon the opening net worth of Schipani on January 1, 1956, we are of the opinion that under the circumstances of this case, the Government would have shown a more consistent approach if, in the pre-indictment period, 1943-1955, inclusive, it had assumed, as it did for the years covered by the indictment, 1956-1960, inclusive, that proof of expenditures in a particular calendar year showed a commensurate income for that year. Where, as here, there was so complete and thorough an exhaustion of non-taxable sources for cash, it seems unnecessary to invoke Schipani's presumption of innocence to sanctify the proposition that he earned, during the pre-indictment years, no more than the maximum gross income ($499.99 or $599.99) which a person may receive without being required to file a tax return. His expenditures, as shown by the Government, for the 1943-1955 period did not include living expenses for himself and family, except for rent. It is more than likely that such living expenses consumed the $1350 in the year and a half of his imprisonment. At any rate, it must have been expended by the end of the 13 year period. Even if it were not, and it remained as a cash resource on January 1, 1956, there would still have

been a substantial increase in net worth in 1956. The total of Schipani's expenditures in the pre-indictment years must have reflected money which he had first received in income. The court in effect so found, and also determined that Schipani had no surplus of earnings over expenditures during that period.

The appellant does not otherwise attack the findings because of a lack of or infirmity in, the evidential bases on which they rest, but rather contests what he describes as the court's "factual theory of the proofs" and the sufficiency of the evidence to establish his guilt on each of the counts beyond a reasonable doubt. Conviction in a net worth case necessarily rests upon inferences reasonably drawn from circumstantial evidence. It is within the province of the trier to draw those inferences and, so long as they are reasonably and logically supported by the evidence they must stand. The trial judge made detailed findings, with annotations of references to pertinent evidence in the record, covering opening net worth and the annual increase in net worth for each separate calendar and tax year for the five years covered by the indictment. We are satisfied that there was ample evidence to support the findings and sufficient proof to establish Schipani's guilt on all of the counts beyond a reasonable doubt.

Appellant argues, in substance, that the presumption of innocence requires, in cases of this kind, based as they are largely on circumstantial evidence, that the proof must be such as to exclude every reasonable hypothesis of innocence. He asserts that the evidence in the present case would have warranted an inference by the court that Schipani had a cash hoard or reserve from which his expendi-

tures and increases in net worth derived, and that, therefore, the Government had the burden of proving that such a hoard did not exist, which it failed to do. In the first place the Supreme Court has characterized this rule for "evaluating the proof" as confusing and incorrect. *Holland* v. *United States, supra,* at 139-140. It declared that the rule to be applied is proof beyond a reasonable doubt, whether the evidence is circumstantial or testimonial. In the second place the totality of circumstances shown by the evidence in the case, including financial assistance given to his family, his borrowings, his delinquency in paying life insurance premiums, instalments on purchase of an automobile, payments on mortgage debt and other bills as well as other incidents found by the trial court, support the conclusion that no such cash hoard ever existed. The absence of such a reserve fund was established as part of the Government's prima facie case. At that point the appellant remained quiet at his own peril. *Holland* v. *United States, supra,* at 138-139; *United States* v. *Mackey,* 345 F. 2d 499, 506 (7th Cir., 1965), cert. denied, 382 U. S. 824; *Fowler* v. *United States,* 352 F. 2d 100, 107 (8th Cir., 1965), cert. denied, 383 U. S. 907 (1966).

The appellant has not on this appeal suggested any nontaxable sources other than a cash hoard, and it appears that the Government negatived all other reasonably possible sources from which Schipani could have acquired nontaxable funds. Under the circumstances, proof of "a likely source" of net worth increases is not necessary. *United States* v. *Massei,* 355 U. S. 595 (1958). Nevertheless, evidence was offered, and the trial court found, that Schipani had likely sources of income from an interest in a restau-

rant and also as a negotiator in labor-management relations. The Government made out a prima facie proof of this fact in the case; it was not contradicted.

The appellant disputes that the Government proved the element of willfulness, that is to say the specific intention to evade the payment of taxes. The evidence of Schipani's apparent attempts to conceal income, however, through the use of assumed names and other devices, and his failure to file income tax returns, considered in connection with the proof of unreported taxable income, are all that are necessary to show the requisite intent. *Holland* v. *United States, supra,* at 139; *Spies* v. *United States,* 317 U. S. 492, 499 (1943).

This leads us to comment briefly on appellant's claim that his constitutional rights were violated because he was convicted of the felony violation of willful tax evasion under Title 26 U. S. C. §7201 "on the charge of failure to file income tax returns" which, if willful, is a misdemeanor under Title 26 U. S. C. §7203. He asserts that §7201 is void for vagueness. Actually he was charged with violations of §7201 as a willful evader and not simply as one who willfully failed to file tax returns under §7203. The latter may under proper circumstances be a lesser included offense of the former. "Willfully" under §7203 calls only for proof that the taxpayer failed to file his tax return intentionally and knowingly and not through accident or mistake or other innocent cause. "Willfully" under §7201 calls for proof that the taxpayer failed to file a tax return with the specific intention of evading or defeating payment of the tax. The context of the respective statutes makes this perfectly clear, and they have been so interpreted, and

construed by the Supreme Court. *Sansone* v. *United States*, 380 U. S. 343 (1965); *Spies* v. *United States, supra.* There is no merit to the claim that §7201 is vague.

Finally, the appellant argues that he was prejudiced by the procedure employed by the trial court in screening certain materials under the Jencks Act, 18 U. S. C. §3500. The procedure used by the trial judge was the same which this court strongly condemned in *United States* v. *Persico*, 349 F. 2d 6, 13 (2d Cir., 1965). The *in camera* proceedings were conducted with the assistant United States Attorney present and participating, but in the absence of defense counsel. In *Persico*, we stated:

> "... the procedure followed was entirely unnecessary and violated Canon 17 of the Canons of Judicial Ethics. We do not consider this a ground for reversal, but it is adverted to solely to assure that such procedure is not followed in the future" (footnote omitted).

The reason that the use of such a procedure was not considered a ground for reversal is that, a study of the transcript of the *in camera* proceeding by this court revealed "that absolutely nothing untoward occurred insofar as the fair trial of this case was concerned" (349 F. 2d at 13).

In the present case the verbatim minutes of the similar irregular proceedings were examined and we, likewise, find that nothing took place that prejudiced the defendant in any way. We, therefore, do not reverse. Neither the lack of prejudice to the defendant in this particular case nor the lengthy explanation for the procedure in the opinion of the trial judge, however, justifies its continued use. We are aware that the *in camera* proceedings in this case

took place prior to the date of the *Persico* decision and the trial court was not on notice of the error, but the use of this procedure after the date of *Persico* will call for corrective action.

There was no other question raised on this appeal as to the handling or disclosure to the defense of Jencks Act material, but the materials withheld from the defendant at the trial were not sealed and sent up to this court as the statute requires. It is essential that the district courts comply with the statutory requirement in this regard.

We have considered the remaining questions raised by the appellant but conclude that they neither disclose a ground for error nor warrant discussion.

The judgment of the district court is affirmed.

APPENDIX B

Opinion by Rosling, *U.S.D.J.*

[3803] UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

63-CR-237

UNITED STATES OF AMERICA,

—against—

JOSEPH F. SCHIPANI,

Defendant.

Appearances:

JOSEPH P. HOEY, ESQ.
United States Attorney
Eastern District of New York
Attorney for United States of America
Donald N. Ruby, Esq.
Assistant U. S. Attorney
Of Counsel

JACOB P. LEFKOWITZ, ESQ.
Attorney for Defendant

ROSLING, J.

Defendant, Joseph F. Schipani, is charged in five counts of an indictment with violation of Section 7201 of the Internal Revenue Code (IRC 1954).[1] Except for the year involved and the dollar amounts specified all counts are alike

in their denunciation. The first count to which the other four conform mutatis mutandis charges in substance that defendant had in 1956 received a taxable income of $13,280.06 upon which he owed a federal income tax of $3,104.02 as to which he was required to make a return to the Director of this [3804] District, and to pay the tax on or before April 15, 1957. It is further charged that with knowledge of such requirement of the law defendant "did wilfully and knowingly attempt to evade and defeat the said income tax due and owing by him to the United States of America for said calendar year by failing to make such income tax return to the said District Director of Internal Revenue, or to any other proper officer of the United States of America, and by failing to pay to said District Director of Internal Revenue, or to any other proper officer of the United States of America, said income tax and by concealing and attempting to conceal from all proper officers of the United States of America the true and correct gross and taxable income of the said defendant Joseph F. Schipani for said calendar year of 1956."

The other counts, each charging a similar offense in parallel language, contain the following differentiating statistical data:

Count	Year Affected	Unreported Income	Unpaid Tax	Unfiled Return Due
II	1957	$ 8,291.92	$1,755.90	4/15/58
III	1958	10,053.99	2,214.04	4/15/59
IV	1959	16,717.51	4,163.15	4/15/60
V	1960	7,832.67	1,640.71	4/15/61

The defendant is adjudged guilty on all counts. The unreported income for the several years is determined to be the following:[2]

[3805]

Tax Year	Gross Income	Taxable Income
1956	$15,798.92	$11,256.55
1957	18,055.47	8,474.67
1958	15,325.64	9,883.88
1959	20,722.93	16,753.29
1960	12,912.99	8,836.98

Motion for a mistrial for alleged irregularities in the court's conduct of proceedings under 18 U.S.C. 3500 (Jencks Act) is denied. For discussion see Appendix following footnotes, infra pp. 45-92.

FINDINGS OF FACT

1. Expenditures were made by defendant during the years 1943 through 1955 of the following amounts segregated by calendar years.[3]

1943	$1,203.47
1944	1,145.60
1945	1,145.34
1946	1,164.64
1947	8,694.02
1948	3,138.80
1949	3,691.73
1950	3,528.62
1951	3,804.05
1952	4,912.86
1953	3,776.71
1954	4,646.71
1955	7,079.72

2. Funds available to defendant on December 31 of each of the years in the period from 1/1/43 to 12/31/55 segregated by calendar years were as follows:[4]

[3806]

12/31/1943	$1,146.52
12/31/1944	955.91
12/31/1945	442.76
12/31/1946/1955	–0–

3. The government in good faith and with great effort and competence conducted an intensive investigation of defendant's financial affairs for the indictment years and the anterior period unaided by any leads supplied by defendant or his wife. When solicited by a government representative for leads they either failed, or refused to furnish them.[5]

4. Defendant had no, or at most trifling, amounts of cash on hand at January 1, 1956, which sum if any was far less than the amount hereinafter found to have constituted his taxable income in any of the indictment years.[6]

5. Defendant's total assets at the beginning and end of each indictment year were approximately as follows:

(Govt. Exhibit 281).[7]

1/1/56 (12/31/55)	$18,908.89	12/31/56	$37,806.52
1/1/57	37,806.52	12/31/57	38,897.48
1/1/58	38,897.48	12/31/58	44,447.77
1/1/59	44,447.77	12/31/59	45,589.33
1/1/60	45,589.33	12/31/60	45,273.58

6. Defendant's total liabilities at the beginning and end of each indictment year were approximately as follows: (Govt. Exhibit 281).[8]

1/1/56 (12/31/55)	$ 1,300.00	12/31/56	$12,890.28
1/1/57	12,890.28	12/31/57	9,964.43
1/1/58	9,964.43	12/31/58	10,468.66
1/1/59	10,468.66	12/31/59	7,236.03
1/1/60	7,236.03	12/31/60	6,028.32

[3807] 7. Net worth (unadjusted) at the beginning and end of each indictment year is arrived at by subtracting the year end liabilities shown on Exhibit 281 (Finding of Fact 6) from the year end assets (Finding of Fact 5), and increase in net worth, by subtracting the year end net worth, thus determined, from the last preceding year end's net worth. These calculations produce the following results which the court determines to be approximately correct, all as set out in the subjoined schedule:

	Net Worth	Net Worth Previous Year End	Increase in Net Worth
12/31/55	$17,608.89		
12/31/56	24,916.24	$17,608.89	$7,307.35
12/31/57	28,933.05	24,916.24	4,016.81
12/31/58	33,979.11	28,933.05	5,046.06
12/31/59	38,353.30	33,979.11	4,374.19
12/31/60	39,245.26	38,353.30	891.96

8. The expenditures made by the defendant during the indictment years are those set forth in Exhibits 286 and 286-A, the latter a continuation of 286. The tabulations are based on proof adduced at the trial by witnesses, by

stipulation in lieu of testimony, by exhibits and by inferences drawn by the court.[9] The expenditures listed on the charts Exhibits 286 and 286-A are found by the court to have been established and the total for each of the indictment years is as follows:

[3808]

1956	$ 7,339.09
1957	9,135.45
1958	10,316.66
1959	17,432.93
1960	10,289.32

9. Defendant's wife, Anne Schipani nee Sclafani, was at all times a housewife with no source of income from wages, salary or otherwise.[10]

10. Adjustments to the "Increase in Net Worth" for the indictment years, the latter being shown as the footings on Exhibit 281, consist of additions to and subtractions from such footings. The results reflect the gross income for the indictment years, all as scheduled in Exhibit 285 and found by the court as a fact. The totals producing the figures representing such gross income are set forth in this finding, and the items entering into such totals are detailed in the appended footnote.[11]

	Increase in Net Worth before adjustment (Exh. 281)	Adjustments to Net Worth Exh. 285)		Gross Income
		Additions	Deductions	
1956	$7,307.35	$ 8,553.09	$ 61.52	$15,798.92
1957	4,016.81	9,135.45	96.79	13,055.47
1958	5,046.06	10,316.66	37.08	15,325.64
1959	4,374.19	17,432.93	1,084.19	20,722.93
1960	891.96	12,080.23	59.20	12,912.99

11. Other than as hereinbefore noted and found, there was neither evidence nor inference reasonably to be drawn from evidence that defendant received nontaxable funds during the indictment years.[12]

[3809]

12. Defendant's financial practices were marked by concealment through use of the names of others, failure to keep records in transactions when record keeping is usual and absence suspicious, extensive use of Manufacturers Trust Co. personal money orders, and large transactions in which currency was used, all in a context of a liberal standard of living during the indictment years, a standard which could be maintainable only by one possessed of substantial means. The court draws the inference that these are circumstances indicative of a consciousness of guilt on defendant's part in having received taxable income for which he wilfully failed to file the returns required by law and to pay the income tax due thereon.[13]

13. Likely sources of defendant's income[14] during the indictment years are an interest in a restaurant business[15] and services as a go-between in labor relations of employers with unions.[16] No finding is made, insufficient evidence having been adduced by the prosecution to substantiate its assertion to such effect, that defendant by his own admission was in receipt of income from illicit sources.[17]

14. There is a tax due and owing by the defendant for each indictment year in approximately the following amounts.[18]

1956	$3,117.49
1957	2,121.39
1958	2,610.52
1959	5,575.85
1960	2,242.09

[3810]

15. Willful evasion is established.[19]

CONCLUSIONS OF LAW

1. Defendant is guilty as charged on all counts.

GEORGE ROSLING
U. S. D. J.

Appendix B—Opinion by Rosling, U.S.D.J.

Footnotes

[3811]

[1] § 7201. Attempt to evade or defeat tax

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

[2] See Finding of Fact 14 for amount of tax due and evaded. The offense is made out upon a showing of failure to file a required return with the essential felonious knowledge and intent as the context of such nonfiling. Other elements having been established by the government, it does not have to prove the exact amounts of unreported income. It suffices for a finding of guilty that significant as contrasted with de minimis amounts are unreported within the appropriate statutory strictures. United States v. Johnson, 319 U.S. 503, 517, 63 S. Ct. 1233 (1943).

[3] Items entering into annual totals are set forth on chart, Government Exhibit 282 prepared and explained by Internal Revenue Service (I.R.S.) Special Agent (Intelligence Division) Masetti, [Tr. M* 3000-3025]. The witness supported his summaries and analyses by reference to the proof adduced at trial consisting of testimony of witnesses, stipulations of counsel in lieu of proof, various documentry exhibits, inferences drawn by him from such proof and numerous schedules nd statistical data compiled by him and comprised in a volume marked as Government's Exhibit 283. All was carefully annotated therein by Mr. Masetti with page references to the minutes of the trial and identification symbols designating the exhibits. Inferences drawn by the witness were not necessarily adopted by the court. Its own inferences, however, largely coincide with those the witness deduced.

[3812]

[4] Items entering into year end totals are set forth on chart, Government Exhibit 284, prepared and explained by Mr. Masetti [Tr. M3031-3060]. The item of $1,350 cash on hand 1/1/43 is based on statement ascribed to defendant in Government's Exhibit 9, an "Admission Summary" produced from an official file concerning de-

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* Masetti's testimony is thus referred to herein.

fendant in the archives of the Bureau of Prisons, United States Department of Justice. Defendant, confined in a Federal Penal Institution in Milan, Michigan, and serving a two-year sentence of imprisonment upon a committment effective 1/14/43 was interviewed by the prison authorities shortly after his admission as a prisoner. The information thus derived as well as data from other sources was embodied in the Admission Summary. The document dated 2/10/43 contains the following note which the court finds constitutes information defendant himself supplied. It reads:

> "10. Resources: This man claims that he has no property, but later admitted that he had a $2,000 insurance policy with the John Hancock Life Insurnce Co. and that he left his wife approximately $1,350 in cash. He later stated that they owned their own furniture."

Defendant, at the opening of the trial before any testimony had been taken, moved to suppress the Admission Summary and "also any leads derived therefrom or any information otherwise obtained through said alleged declarations or leads." His counsel grounded such motion upon the alleged confidentiality of defendant's disclosure and the illegality of the government's proposed use of it. These contentions need not here be restated inasmuch as they were formulated in voluminous motion papers and a supporting memorandum. They were, moreover, thoroughly explored in a lengthy argument and discussion at the opening of the trial. [See Tr. on motion to suppress, pp. 6-66]. At page 66, ibid. the court denied the motion, as well as derivative companion motions to inspect the grand jury minutes and to quash the indictment upon the defendant's assumption that the evidence thus challenged as illegal had been submited to the grand jury which reported the indictment and in consequence vitiated the proceeding.

As an incident of the denial of the motions the court reserved to the defendant the right when the evidence came to be offered at trial to renew his objection, with the possibility left open of a hearing should one be required and applied for.

The government in due course marked the Admission Summary as an exhibit for identification at the trial proper [Exhibit 9, Tr. 98] and upon its offer shortly thereafter was [3813] met by renewed objection of the defendant. This precipitated further colloquy and argument. The document was finally, with certain omissions, admitted into evidence at Tr. 132. It thus appears that the subject of its ad-

missibility has been thoroughly discussed and considered. Defense counsel now continues in his post-trial memorandum to press his claims of error.

Central to the ruling as to whether the exhibit should be received is the principle noted several years since in St. Regis Paper Company v. United States, 368 U.S. 208, 218, 82 S. Ct. 289, 295 (1961), that it is the court's "duty to avoid a construction that would suppress otherwise competent evidence unless the statute, strictly construed, requires such a result." With a like approach Wigmore on Evidence, Vol. I, § 10, p. 293, enunciates as "[t]he second axiom on which our law of Evidence rests" that "[a]ll facts having rational probative value are admissible, unless some specific rule forbids."

Both Wigmore (ibid.) and Fisch (New York Law of Evidence, § 3, p. 3) cite Professor Thayer's Preliminary Treatise on the Law of Evidence (1898) as authority for the version of the precept which teaches that "unless excluded by some rule or principle of law, all that is logically probative is admissible." See also Richardson on Evidence, Ninth Edition, § 5, p. 4.

Closely analogous to what is here presented is the factual situation considered in Smith v. United States, 236 F. 2d 260 (8th Cir. 1956), cert. denied 352 U.S. 909, 77 S. Ct. 148, wherein it was held that it was not error in a prosecution for income tax evasion for the government to introduce at trial statements by the defendant declaring his assets, even though it appeared that these had been made while he was confined in a penitentiary under an earlier conviction. The exhibits had been filed by defendant in connection with a parole application, but did not themselves constitute part of the parole hearing itself. There was then no statutory bar to such use, nor is there any today. The regulations in force at the time governing use of prison records were formulated by the Attorney General (Section 2.14, 28 C.F.R.) and have since been amended, but with substance as it concerns us here unchanged. (See also Sections 2.15 and 2.16 of the Regulations, 28 C.F.R.) Section 2.14 was cited in Smith by defendant against the government as barring the use of the records as allegedly confidential and not open to the prosecution for support upon a charge of crime unrelated to or arising out of the making of the statements.

[3814]

The Ninth Circuit found defendant Smith's position untenable and adjudged that no error had arisen from such use to establish

an admission by defendant Smith that he had had no assets while in the penitentiary. Currently § 2.16 of C.F.R. 28, revised as of 1/1/65, provides that hearings on parole "shall not be open to the public, and the records of all such hearings shall be treated as being confidential and shall not be open to inspection by the prisoner concerned or any other unauthorized person." Analysis of the provision and its reach need not further detain us inasmuch as the exhibit involved is not a record of a parole hearing.

A general "housekeeping" provision 28 C.F.R. § 16.1, promulgated by the Attorney General under authority of Reorganization Plan No. 2 of 1950, Sec. 2, 5 U.S.C. 22, is of more immediate pertinancy. § 16.1 is contained in Order No. 324-64, 29 F.R. 14027, 10/10/64, and reads, relevantly, as follows:

> "Production or disclosure of official information or material in response to a subpoena, order, or other demand prohibited unless approved by the Attorney General.
>
> "No officer or employee of the Department of Justice shall produce or disclose, in response to a subpoena, order or other demand * * * of a court or other authority any information or material contained in the files of the Department of Justice or any other information or material acquired as a part of the performance of his official duties or because of his official status, without the prior approval of the Attorney General * * *."

The point need not be labored that the provision is a defensive measure of the department calculated, hopefully, to keep its files free of intrusion from third parties save upon the Attorney General's consent. The U. S. Attorney and members of his staff are among those who by definition set out in § 16.1 are categorized as officers and employees of the Department of Justice. Exhibit 9 itself contains a certificate of the Attorney General which authenticates the status of the Director of the Bureau of Prisons which supplied the document from its files. The director with his own further certificate produced from the Bureau's file, of which he is the custodian, the exhibit in controversy. The Bureau of Prisons, its Director and employees are, of course, under the direct jurisdiction of the Attorney General. (Ch. 303, Title 18) Such certification and authentication of the exhibit thus [3815] establish the requisite "prior approval" of use, if explicit approval were required, by the U. S. Attorney. Cf. Arrow Distilleries v. Alexander, 109 F.2d 397, 405, syllabus division 20 (7th Cir. 1940), cert. denied, 310 U.S. 646.

United States v. Caserta, 199 F.2d 905 (3d Cir. 1952), cited by defendant is distinguishable. That case involved the use by the government in an unrelated prosecution of information which had been supplied by the selectee on a selective service questionnaire. The document contained a representation to the effect that the information was confidential except for certain specified uses by the government. These did not include the prosecution in question. The appellate court felt that the pledge thus made by the government to registrants should be kept in good faith. The draftee surely would be morally entitled to have the sovereign held to its covenant. The convict, on the other hand, subject to penal restraint thereby yields certain of the subsidiary rights of freedom in the interest of his reform and restoration to society. "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." Price v. Johnston, 334 U.S. 266, 285, 68 S.Ct. 1049, 1060 (1948).

There is no substance to the contention urged here by defense counsel that a disclosure made in 1943 that the prisoner then possessed only $1,350 should now, 20 years later, be suppressed as a circumstance tending to support a charge that defendant had committed crimes in 1957 and later years, long after the original disclosure. The 1943 financial representation may have been an involuntary incident in what was surely a duressing restraint upon defendant. The information thus furnished by defendant could not have been withheld by the prisoner as in any sense self-incriminating in 1943. Nor does its current use against defendant breach any governmental pledge earlier given to keep a confidence inviolate.

A further accession of funds with which the government has credited defendant in the preindictment years, as serving to build up a potential "hoard" upon which defendant might have drawn during the indictment quinquennium, and which to that extent negatives current income as the source of the disbursement in the indictment period, is shown on the chart of available funds [Exhibit 284 ffn (c) and (e)]. The chart notes with transcript reference [pp. 876-884, and 1171] an estimate of $500 as having been given to Anne Schipani, wife of defendant, by his brother Ralph Schipani and his sister Angelina Battaglia in 1943, and the further sum of $250 in 1944. These and others of defendant's siblings who testied variously as to having made such gifts or not to have done so [3816] indicated quite clearly that their donations were trifling and only occasional, and were intended to help the wife during the difficult year and a half of her

husband's sojourn in Milan Penitentiary. It was Agent Masetti, and not these witnesses, who supplied the estimated totals with which defendant was thus credited. The court has accepted such estimates as not exceeding that which was reasonable. The court's own view based on the evidence Masetti took into account is that the credit was unduly generous. But as a figure favorable to defendant the court accepts it. It may be noted that the government with similar benefit to defendant's position did not *charge* him in its correlative Expenditure Schedule [Exh. 282] with disbursement of any money for food, as well as other items of ordinary living expense.

The second column on Exhibit 284 gives the defendant credit for the receipt of maximum gross income for the years 1943, 1944, 1945, 1946 and 1947 of $499.99 in each year, and of $599.99 in each of the succeeding years through 1955. This was based upon the fact that the relevant Internal Revenue Code provisions (Section 6012, I.R.C. 1954; Section 51 I.R.C. 1939) required under criminal penalties, elsewhere imposed for violation, that income tax returns be filed when the taxpayer's gross income was at least one cent higher than the amount credited in the chart, namely $500 for the earlier years and $600 for the later. The fact that defendant did not file any income tax returns for the years noted is equated by legal presumption with an admission on his part that he had received gross income in the tax year affected of less than the statutory minimum which would have required him to file a return [See Leeby v. United States, 192 F.2d 331, 333-334 (8th Cir. 1951); United States v. Skidmore, 123 F.2d 604, 610 (7th Cir. 1941), cert. denied 315 U.S. 800; United States v. Doyle, 234 F.2d 788, 794 (7th Cir. 1956), cert. denied 352 U.S. 893, 77 S.Ct. 132; Hanson v. United States, 186 F.2d 61 (8th Cir. 1950); United States v. Glazer, 110 F. Supp. 558, 561 (D.C. Mo. 1952)]. To give full effect to a defendant's presumption of innocence the court is required, notwithstanding that no income were shown to have been earned during any pre-indictment year, to assume in the defendant's favor the maximum gross income per year which the statute stipulates is not reportable. The presumption of innocence operates on the act considered in its contemporaneous context, and not in relation to its effect in an evaluation of the later events first generated in the indictment years.

The chart, Exhibit 284, has, however, been modified with respect to the years 1945 and 1946 as to income established by proof to have in fact been received which requires credit to defendant of the sum received. Such substitution of actual [3816] income in place of the

presumed maximum gross income involves the year 1945. Government Exhibit 135, certificate of the Social Securit Administration, confirms the fact that defendant had earned in that year through his employment with the National Ship Scaling and Painting Corp. the sum of $632.19. When such sum is substituted for the presumed gross maximum income which is not reportable for the year in which earned the procedure requires adjustments for the years 1945 and 1946. The effect of these is to increase the cash on hand at 1945 year end to $442.76 which is carried over to cash on hand on 1/1/46. Inasmuch as, notwithstanding such increased credit, the expenditures exceed the starting cash plus receipts for the year 1946, the cash on hand at the end of 1946 continues to be reported as "-0-." A further adjustment is required to accommodate such amendment by an increase of the figure shown on the chart as the total of maximum gross income for all years listed. The increase is from $7,299.87 to $7,432.07.

The recapitulation forming an appended part of Exhibit 284 aggregates the figures showing the funds available as entered thereon for the period from 1/1/43 to 12/31/55, producing a total of $9,694.87. The increase of maximum gross income to $7,432.07 increases the total to $9,827.07.

The expenditures for the corresponding years, taken from the footings of chart Government Exhibit 282 and entered in Exhibit 284 in the fifth column under the heading "Less Expenditures" are shown to amount in total to $47,932.27, a figure far exceeding the "funds available" so far as the government has been able to ascertain them by its investigation.

Defense counsel points with some indignation to the inescapable fact that upon this demonstration, and with no capital conversions shown which might come even close to bridging the gap between cash inflow and outgo of available cash, there is a patent incompleteness in the calculations. If the apparent excess of expenditures over receipts was covered by other sufficient items of receipt, both principal and income, why stop there? defense counsel asks argumentatively. Does not the presumption of innocense require that the government's expert take into account in the calculations he makes a sum sufficient not only to liquidate the deficit, but also to produce a surplus, a hoard large enough at the end of the preindictment period to account for the excess of expenditures over non-taxable receipts in the indictment years? [3818] A number of factors, however, are seen quickly to dissipate the seeming force of this contention. In the first place, the principle of Rossi v. United States, 289 U.S. 89, 53 S. Ct. 532

(1933) and Holland v. United States, 348 U.S. 121, 75 S. Ct. 127 (1954), in the context of the factual situation about to be noted gives the government its prima facie case when it has sufficiently proved, as it has here, such receipts and disbursements as its good faith investigation has distilled from the infinite and uncharted sea of the financial affairs of all mankind. If the defendant is dissatisfied with the product thus prima facie established, he need but furnish the prosecution with the leads those cases speak of.

Furthermore; the deficit in receipt is a mathematical and economic fact, if one accepts the probative validity of what the government adduces as preindictment income and resources it has uncovered and no more. Logic does not however, require that an *excess* over what is needed to liquidate the obligations discovered to have been paid be postulated.

Finally, as appears in finding of fact 4 and footnote 6 the circumstantial evidence touching defendant's economic situation during the "hoarding" years is such as to render it unlikely that defendant was able to do more than balance expenditure with receipt and assets on hand, and even that with difficulty.

[5] The government's investigation was thorough and sweeping for the period dating back to 1943, and spotty for earlier years. Search was made of the files for the years 1932 through 1960 in the Surrogates Courts of Kings and New York Counties for evidence of legacies from relatives of the defendant to him and immediate family. The indices of the Register's and County Clerk's offices of the Counties of New York, Kings and Nassau were run for purchases, sales and mortgage transactions affecting real property in those districts during the years 1940-1960 and in which the defendant or his wife might have been grantor, grantee, mortgagor or mortgagee.

Additionally, nearly one hundred banks, both headquarters and branches, in the New York area were investigated to ascertain whether checking or savings accounts or safe deposit boxes had been opened or closed by defendant or his wife, and whether there was evidence of loans obtained by them from these banks. The banks selected for investigation were those located in the vicinity of defendant's residence in Brooklyn and Nassau or in areas frequented by him. Banks from [3819] which defendant had purchased money orders or which were used by persons whose activities impinged on

those of defendant were likewise checked. The inquiry was directed as well to several finance companies in the New York area, the major credit bureaus and agencies for possible loans involving defendant and his spouse. Numerous friends and relatives were interrogated as to pertinent financial transactions, including possible gifts or loans made at any time to the spouses.

The Estate and Gift Tax offices of the federal government were also checked for returns of gifts filed by relatives as donors.

Records of the Treasury Department listing the purchase and redemption of United States Savings Bonds were resorted to for pertinent information. Contact was also made with various insurance companies, brokerage firms, retail stores and other commercial establishments to ascertain what goods were purchased by, and services rendered to or for, defendant and his family during the years 1943 through 1960.

Leads which were come upon in the course of the investigation were pursued and checked out.

All this activity was concentrated upon obtaining of data from which there might be compiled defendant's net worth at the beginning and end of each indictment year, and with a view to determining the extent, if any, to which an increase therein was attributable to taxable income.

The government's task in carrying forward its investigation to the goals envisaged was immeasurably complicated and rendered more difficult of fruition by the uncooperative conduct of defendant and his wife in their refusal to furnish leads. No adverse inference, of course, may be drawn from their refusal to surrender their constitutional privilege to remain silent and to have the assistance of counsel at a time when it was clear that the defendant, and possibly the spouse, were the target of an ongoing investigation the culmination of which would, if culpability was sufficiently indicated, be a criminal prosecution. Cf. Escobedo v. State of Illinois, 378 U.S. 478, 490, 491, 84 S. Ct. 1758, 1764, 1765 (1964) and consider what the principle therein enunciated promises by way of extrapolation.

The prosecution, however, is authorized in meeting its obligation to establish a prima facie case on trial of an indictment when found, to mortar an otherwise less than perfect structure of proof by citing in extenuation of [3820] charged incompleteness the

defendant's failure to indicate where additional masonry helpful to him in instructuring the financial edifice might be come upon. "[I]t is not incumbent" the Supreme Court declared in Rossi v. United States, U.S. at p. 91, S. Ct. at p. 533 (supra fn. 4) "on the prosecution to adduce positive evidence to support a negative averment the truth of which is fairly indicated by established circumstances and which, if untrue, could be readily disproved by the production of documents or other evidence probably within defendant's possession or control," citing texts and cases. So also in Holland v. United States, U.S. at p. 138, S. Ct. at p. 137 (supra fn. 4) an income tax evasion prosecution, the court pointing to Rossi for precedent, held that "where relevant leads are not forthcoming, the Government is not required to negate every possible source of nontaxable income, a matter peculiarly within the knowledge of the defendant."

[6] Defendant's general and pervasive lack of cash approaching at times impecuniosity and utter poverty is supported by inferences to be drawn from circumstantial evidence. The court rejects the alternative inference, as presenting only a possible but highly unlikely eventuality in the context of all the evidence in the case. This includes lack of leads by defendant to evidence supporting such alternative inference, namely, that defendant had funds, but perversely and unreasonably conducted himself as though he were impoverished. By his own admission upon official interview at Milan Penitentiary in 1943 he had but $1,350 in cash in 1943 which he left with his wife. Yet she, it appears, was receiving small handouts during the term of his imprisonment from other members of his family scarcely themselves persons of means. Such receipts as the prosecution could demonstrate during the preindictment period fell far short of meeting his living and other day-to-day expenses even though estimates for all his food bills and much of what must have been spent for clothing for himsel, his wife and children were omited from the statistical comparison. Their inclusion would have made the deficit to be accounted for by nontaxable assets and receipts that much greater.

During the preindictment period the purchase of a home with a substantial cash down payment, the ownership of one and possibly two cars, the employment of a maid, and other items of disbursement betokened a standard of living considerably above a mere sub-

sistence level. The court will not, however, presume, with no proof to sustain the presumption and when it is not shown that the prosecution has ignored leads which might have produced the proof, that the defendant [3821] disbursed less than his complete income in those years in maintaining his indicated standard of living, thereby postulating a preindictment year reserve of cash as having been built up by defendant. Thus where records exist, e.g. those of the Social Security, the files report only $293.10 in 1944 and $632.19 in 1945 as earnings received by defendant. These are attributed to employment with the National Ship Scaling Company [Exhibit 135].

The defendant, moreover, filed no income tax returns during these years [Tr. 61-66], a fact established by the files in the statutory filing districts, to wit, the taxpayer's residence, or place of business. [26 U.S.C. (1954) 609; 26 U.S.C. (1939) § 53(b)(1)] The effect of such nonfiling brings into play, as earlier noted, the presumption that defendant had less than 500 or 600 dollars gross income in the referent years.

That defendant's wife did not work during the preindictment period is borne out directly by testimony of defendant's sons Joseph and Frank and of Pauline Trento, a friend of the wife, and circumstantially, by the inference to be drawn from the wife's failure to file returns. [Tr. 901-904; 957-962; 1788-1795].

The court does not consider as having any probative value *against* the defendant any representations in which he did not participate made by the wife or others than himself in statements certifying either his or her employment during these years or later, nor *a fortiori* information gathered by credit agencies and reported back to the concerns which engaged their services. Documentary evidence was received at trial under 28 U.S.C. 1732(a). The civil rule, it is well known, has equal application to criminal prosecutions. [United States v. Brewster, 231 F. 2d 213, 215 (2d Cir. 1956), cert. denied 77 S. Ct. 1282; United States v. Kimmel, 274 F. 2d 54, 57 (2d Cir. 1960); United States v. Re, 336 F. 2d 306 (2d Cir. 1964), cert. denied 379 U.S. 904]. Records made in the regular course of business serve to establish that the transaction recorded has in fact taken place. Statements in such record, however, not shown to emanate from the defendant himself, are here given no weight against him as *res inter alois acta,* and do not bind him, absent a showing of authorization.

Finally, with the absence of leads serving to handicap inquiry, it appears that the government's investigation of the wife's affairs has

failed to turn up evidence that [3822] she had received any income during this period. The court in this connection rejects as false the statement in a loan application [Government Exhibit 131] which she submitted to the Manufacturers Trust Co. in 1956 that she was employed by Rosetta Coat Co. as a designer and had been so employed for ten years prior. It may be noted that her signed application contains the egregious falsehood that she was single. Attorney for defendant stipulated at trial she was defendant's wife. [Exhibit 131, 170; Tr. 1229; 1728-1729; 1737]

Additional circumstances evidencing defendant's straitened situation in the preindictment years and the unlikelihood of his having accumulated by the opening of the indictment term a hoard into which he might thereafter dip as into a Fortunatus purse are his picayune borrowings; his persistent delinquency in payment of life insurance premiums in trifling amounts, his failure to close an advantageous real estate purchase in 1949 or 1950 which he deferred for two years because of his professed lack of the $250 that the seller demanded as consideration, the purchase in 1955 of a Ford automobile on time with subsequent delinquency in payment of installments to the finance company, the suffering of a default judgment in 1955 in the sum of $64.05 recovered by a Health Club upon its claim, at no time disputed, for $46 "dues", and the ultimate payment of $55 in settlement of the judgment; and the raising early in 1956 of a $10,000 mortgage on his one-family house at 94 Brookline Avenue, Long Beach, with substantial charges incidental to such loan deducted from the amount advanced. The immediate cashing of the check received on the loan is suggestive of urgent necessity to use the proceeds. Here too we find the defendant failing to meet periodic payments due on the mortgage with dangerous consequences a possibility not lightly to be ignored by one able to meet them. In respect of several of the mortgage payments which he was in fact required in 1957 by the lender to pay—and did—$23.49 in late charges, [Exhibits 101-109. Tr. 207-209; 730-744; 765-769; 937-943; 950; 955] were incurred.

In 1956 he is again buying a Ford car with the major part of the price financed. [Exhibits 130-134. Tr. 970-973; 989]

Jalousies for the Long Beach house were in 1958 financed through a bank and in the same year a boat was purchased by defendant with additional financing by the same lending institution.

Strongly leading to the conclusion arrived at by the court that many of these delinquencies and borrowings were [3823] coerced by

lack of a hoard on which defendant might draw for cash immediately needed and that instead currently received income in the indictment years provided the source for current expenditures and that defendant was not thereby evincing traits of irresponsibility or indifference to business obligations, is the fact, later noted herein, that he went to great lengths to conceal or mask his procedures so that they could not be directly brought home to him. This accounts for his self-defeating involvement of third persons in his affairs, whose names and identities were used or even without their consent appropriated by him in transactions the only apparent purpose of which was to cover his trail. If he had had the cash with which to complete his purchases he surely would not have resorted to the clumsy expedients that now only worsen his situation as pointing to a consciousness of guilt.

The Holland case, supra, is here relevant as illustrating a factual environment in a measure analogizing the situation here presented. In Holland the taxpayer's claim of the government's failure to include "in its opening net worth figure an accumulation of $113,000 in currency and 'hundreds and possibly thousands of shares of stock' which they [allegedly] owned at the beginning of the prosecution period" is dissolved by the acid of evidence of defendants' revealing conduct. We continue with the court's analysis for the methodology—alternative, not exclusive—it suggests.

> "They [taxpayer petitioners] asserted that the cash had been accumulated prior to the opening date, $104,000 of it before 1933, and the balance between 1933 and 1945. They had kept the money, they claimed, mostly in $100 bills and at various times in a canvas bag, a suitcase, and a metal box. They had never dipped into it until 1946, when it became the source of the apparent increase in wealth which the Government later found in the form of a home, a ranch, a hotel and other properties. This was the main issue presented to the jury. The Government did not introduce any direct evidence to dispute this claim. Rather it relied on the inference that anyone who had had $104,000 in cash would not have undergone the hardship and privation endured by the Hollands all during the late 20's and throughout the 30's. During this period they lost their cafe business; accumulated $35,000 in debts which were never paid; lost their household furniture because of an unpaid balance of $92.20; suffered a [3824] default judg-

ment for $506.66; and were forced to separate for some eight years because it was to their 'economical advantage.' During the latter part of this period, Mrs. Holland was obliged to support herself and their son by working at a motion picture house in Denver while her husband was in Wyoming. The evidence further indicated that improvements to the hotel, and other assets acquired during the prosecution years, were bought in installments and with bills of small denominations, as if out of earnings rather than from an accumulation of $100 bills. The Government also negatived the possibility of petitioners' accumulating such a sum by checking Mr. Holland's income tax returns as far back as 1913, showing that the income declared in previous years was insufficient to enable defendants to save any appreciable amount of money. The jury resolved this question of the existence of a cache of cash against the Hollands, and we believe the verdict was fully supported."

In Holland leads had been furnished which the government was in duty bound, albeit within reason, to explore. Here no leads were provided. Thereby the other prong of the Holland rule was bared to disadvantage the defendant, for the Court had written further that, "[o]nce the Government has established its case, the defendant remains quiet at his peril. Cf. Yee Hem v. United States, 268 U.S. 178, 185, 45 S. Ct. 470, 472, 69 L. Ed. 904. The practical disadvantages to the taxpayer are lessened by the pressures on the government to check and negate relevant leads."

Other similarly illustrative situations which need not here be restated are presented in the cases, companion to Holland, of Friedberg v. United States, 348 U.S. 142, 75 S. Ct. 138 and Smith v. United States, 348 U.S. 147, 157, 75 S. Ct. 194, 199. See also United States v. Ford, 237 F. 2d 57, 62 (1956) case remanded to the District Court upon the suggestion of mootness with directions to vacate judgment of conviction and to dismiss the indictment on that ground; Gariepy v. United States, 189 F. 2d 459 (6th Cir. 1951); Remmer v. United States, 205 F. 2d 277, 286 (9th Cir. 1953), reversed on other grounds —just tampering.

[7] "An estimate of the taxpayer's net worth as the means of determining his income is resorted to in the absence of accurate records which it is his duty under the statute to [3825] make and to preserve, and by its very nature is an approximation; * * *." Bell v. United

States, 185 F. 2d 302, 308 (4th Cir. 1950), cert. denied 340 U.S. 930, 71 S. Ct. 492. See also Remmer v. United States, supra p. 287; Schuermann v. United States, 174 F. 2d 397 (8th Cir. 1949), cert. denied 338 U.S. 831.

The Exhibit 281 assets were the only ones found by the government upon intensive investigation and in the absence of leads furnished by defendant or his wife.

Cash: None. This has been earlier covered.

Bank Accounts are: Flatbush Savings Bank, accounts No. 202571, 202787 and 254040 [Exhibits 71-74. Tr. 585-609] and Masetti evaluation with his worksheets and analysis, [Exhibit 283 for support; M3079-3083] and Dime Savings Bank, a nominal account, No. 1519081, maintained by defendant in the name of a friend Nancy Segreto so that he could qualify for a safe deposit box at the bank in the pretended depositor's name. The bank rented vaults only to depositors. [Tr. 1054-1057; Exhibits 145 and 146. Tr. 1062-1063, 1067-1074, 1076-1086, 1090-1102, M3083-3084].

Investments are: Gurney's Inn Corp. [Stipulation on trial, Tr. 1033-1044; Exhibit 141, M3084-3086] and U. S. Savings Bonds [Tr. 608-626; Exhibit 75-79, M3086-3089].

Real Estate and Improvements are: 94 Brookline Avenue, Long Beach, two parcels purchased by defendant from Lenitz, one for $15,000 and the other for $540, and a strategic strip of land acquired from Clamons in 1952 for $250. [Tr. 179-188; 202-215; Exhibit 15, 16 and 20, M3089-3091] and Jalousies [Stipulation, Tr. 2144-2149; Exhibit 221; M3091-3092].

Furniture: From Levine [Stipulation, Tr. 927-929; Exhibit 117 and 118; M3092-3094] and Selwyn-Pomeroy [Stipulation, Tr. 678-696, 704-705; Exhibit 85-87; M3095-3097].

Automobiles and Boat: 1955 Ford [Tr. 628-642; Exhibit 80; M3097-3100] purchased by defendant in wife's maiden name and disposed of in 1956. Hence, $2,704, its cost is eliminated from 12/31/56 net worth and $1,214 ($2,704 less [3826] $1,490 its market value, taken as evidence of the sum realized on disposition) is entered on Exhibit 285 ("Adjustments to Net Worth", q.v.) as increase in net worth for the following year. The adjustment correctly reflects the exchange effect of the transaction [M3170-3176].

1957 Ford purchased by defendant from Wolff Motors in 1956, defendant again using his wife's maiden name. [Stipulation, Tr. 970-973, 989; Exhibit 130; M3100-3101] Purchase was financed through Manufacturers Trust Co. [Tr. 994-1007; Exhibit 131-134; Testimony of Louis Esposito, Tr. 2268, et seq. passim.] In 1960 this automobile was resold to Lynn Motors for $700 [Stipulation, Tr. 2619] and accordingly was not thereafter included in the 1960 year-end net worth statement [Exhibit 281]. The effect of such purchase and resale was properly accounted for in the computation of defendant's 1960 gross income by adding $1,790.91 to defendant's 1960 increase in net worth [Exhibit 285], and simultaneously eliminating $2,490.01, the cost of acquisition, from defendant's net worth at 12/31/60 [Exhibit 281; M3176-3179].

Boat purchased in 1958 by defendant with his own funds and for own use in the name of his friend Esposito. Price paid was $2,100 plus a trade in of another boat. [Tr. 2024-2030, 2035-2090, 2268-2289; Exhibit 214-217] The purchase was financed through Franklin National Bank with defendant using Esposito as the nominal borrower. [Tr. 2052-2060, 2071-2074, 2175-2194; Exhibit 214-217, 230.] Subsequently the loan installments were paid by defendant with bank money orders which defendant himself signed, affixing, however, Esposito's name as the ostensible signatory. [Stipulation 2632; Exhibit 231-x-23]

[8] Exhibit 281 lists as liabilities of defendant during the 1956-1960 period the amount of principal owed by defendant on his loan obligations at the end of each indictment year. Interest payments made by defendant on the principal indebtedness scheduled in Exhibit 281 as liabilities as well as finance charges incurred in connection with the consummation of these obligations are set out in the list of defendant's expenditures on Exhibit 286 and 286-A, later considered and discussed. The liabilities follow:

Lenitz mortgage arising out of the purchase of the Brookline property. [Tr. 179-199; Exhibit 17; M3102-3104]

[3827]

Colonial Realty Co., $10,000 mortgage raised by defendant on such property. [Tr. 730, 744, 765-766; Exhibit 101-106, 109-x-23; M3104-3107]

Franklin National Bank—Loan to finance defendant's purchase of jalousies. [Tr. 2159-2175; Exhibit 221, 227-229; M3107-3111]

Associates Discount Corp.—Loan to finance purchase of 1955 Ford. [Tr. 628-642; Exhibits 80 and 81; M3112-3115]

Manufacturers Trust Co.—Loan to finance purchase of the 1957 Ford. [Tr. 994-1007; Exhibit 130-134; M3115-3118]

Franklin National Bank—Loan to finance boat purchased by defendant in the cover name of Esposito. [Tr. 2175-2194, 2632; Exhibit 214-217, 230-231; M3118-3121]

Marion Levine—Furniture purchased from Levine on deferred payments. [Stipulation, Tr. 927-929; Exhibit 117 and 118; M3121-3122]

Selwyn-Pomeroy—Furniture purchased from the seller, likewise on deferred payments. [Stipulation, Tr. 678-696, 704-705; Exhibit 85-87; M 3122-3124]

[9] The items entered upon the combined Exhibit 286/286-A are too numerous for detailed or for even limited analysis. They are accordingly listed herein with pertinent transcript references only. Despite their volume they draw a picture that is no doubt incomplete. That does not, without more, detract from the efficiency of the prosecution's proof in establishing the requisite prima facie showing. The good faith of the prosecution, its skill and its industry, in investigation, all have been demonstrated to the court's satisfaction beyond a reasonable doubt. In the absence of leads supplied by defendant, no inference may be drawn by the court that further prospecting in areas which the defense does not even now designate would be fruitful in defendant's interest. The expenditures which the court finds fully established are:

Rent—Nineteen Building Co. [Tr. 132-160; Exhibit 10-14; M3136-3137]

Insurance premiums—Metropolitan Life Insurance Co. [Tr. 234-261; Exhibit 24-27; M3139-3140]
[3828]

Gardening—Louis Biamonte & Sons. [Stipulation, Tr. 337-339; Exhibits 47 and 48]

Property taxes—94 Brookline Avenue—See discussion supra.

Brooklyn Union Gas Co.—[Stipulation, Tr. 387-391; Exhibit 51 and 52]

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Roosevelt Garage—[Tr. 547-554, 566-567; Exhibits 61 and 62]

New York Telephone Co.—[Stipulation, Tr. 571-583; Exhibits 66-70]

Insurance Premiums—John Hancock Life Insurance Co. [Exhibit 34, Tr. 320-330, 412; Exhibit 35, Tr. 393-397, 403, 405, 410-411; Exhibit 36, Tr. 426-428; Exhibit 37, Tr. 405-410; Exhibit 38, Tr. 412-415; Exhibit 39, Tr. 415-418; Exhibit 40, Tr. 419-420, 425, 426; Exhibit 41, Tr. 428-431; Exhibit 42 and 54, Tr. 432-433, 446-447, 461-466; Exhibit 43 and 57, Tr. 504-505, 508-517; Exhibit 44 and 56, Tr. 475-476, 485-488; Exhibit 45 and 55, Tr. 466-474; Exhibit 46, Tr. 490-491, 495-504; Exhibit 58-x-23—Stipulation, Tr. 520]

Consolidated Edison Co.—[Stipulation, Tr. 712-715, Exhibit 92 and 93]

Mortgage—Brookline Avenue—[Lenitz, Tr. 188-195, Exhibit 17]

Haberdashery—[Levin—Stipulation, Tr. 709-711, Exhibit 90 and 91]

Madison French Cleaners—[Stipulation, Tr. 706-709, Exhibit 89]

S. Friedman Furs, Inc.—[Stipulation, Tr. 716-719, Exhibit 94 and 95]

Gymnasium Membership for defendant's wife—[Bay Factors, Stipulation, Tr. 719-722, Exhibit 96 and 97]

Plumbing—94 Brookline Avenue—[H. V. Snow, Stipulation, Tr. 723-729, Exhibit 98 and 99]

Dr. A. Sternbach—[Stipulation, Tr. 933-935, Exhibits 123 and 124]

Dr. Jerome Kaufman—[Stipulation, Tr. 931-933, Exhibits 121 and 122]

[3829]

St. Francis Prep. School—[Stipulation, Tr. 929-931, Exhibits 119 and 120]

Insurance, general—Colonial Realty Corp.—[Tr. 745-746, 749, 753-759, 766; Exhibit 107 and 109-x-23; M3145-3146]

Interest Payments—Colonial Realty Corp.—[Tr. 730-744, 765-769; Exhibits 101-106, 109-x-23; M3146]

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Mortgage Expense—Colonial Realty Corp.—[Tr. 937-939; Exhibit 101-105; M3146-3147]

Safe Deposit Box—Dime Savings Bank—Defendant used name of a friend's wife, Nancy Segreto, as lessee. [Tr. 1044-1053, 1060-1061; 1062-1063, 1067-1074, 1076-1086, 1090-1102, 1806-1810. Stipulation, Tr. 2631-3631-A, Exhibits 142-144; M3147-3148]

Maid full time—Ada Graham—[Stipulation, Tr. 1018-1019]

Dr. H. B. Herman—[Stipulation, Tr. 1027-1028; Exhibit 136]

Dr. Barnett A. Greene—[Stipulation, Tr. 1028-1030; Exhibits 137 and 138-x-23]

Dr. Robert L. Fisher—[Stipulation, Tr. 1031-1033; Exhibits 139 and 140-x-23]

Interest and late charges re 1955 Ford purchased by defendant and financed by Associates Discount Corp. [Tr. 628-642, 656; Exhibits 80 and 81; M3149]

Interest re financing 1957 Ford, Manufacturers Trust Co. [Tr. 994-1007; Exhibit 130-134; M3149-3151]

Dr. Joseph Eisenstein—[Stipulation, Tr. 1140-1143; Exhibits 149 and 150-x-23]

New York Phoenix School of Design—[Stipulation, Tr. 1143-1146; Exhibit 141]

Jewish Hospital of Brooklyn—[Stipulation, Tr. 1146-1149; Exhibit 152]

Church of St. Ann—[Stipulation, Tr. 1149-1151; Exhibit 153-x-23]

[3830]

Holy Innocents Building Fund—[Stipulation, Tr. 1152-1154; Exhibit 156-x-23]

Wedding of defendant's son Joseph—Belmont Plaza Banquet Inc. [Stipulation, Tr. 1155-1158; Exhibit 158]; Kayne Miller Orchestra [Stipulation, Tr. 1159-1162; Exhibit 160-161]; Atlas Floral Decorators [Stipulation, Tr. 1162-1163; Exhibit 162]; Ben Zuckerman [Stipulation, Tr. 1163-1165, Exhibit 163-164]

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Maimonides Hospital—[Stipulation, Tr. 1179-1181; Exhibits 166 and 167]

Whitehouse Garage—[Stipulation, Tr. 1181-1188; Exhibit 193]

Long Island Water Corp.—[Stipulation, Tr. 1190-1192; Exhibits 168 and 169]

General Motors Acceptance Corp.—Payments on a 1960 Oldsmobile purchased by defendant's son. [Tr. 1398-1399, 1407-1408; 1816-1817; 1853-1855; Stipulation, 2632-2633; Exhibits 177 and 178, M3154-3155]

Unity Hospital—[Tr. 1751; Exhibit 154]

Mme. Denise French Cleaners—[Tr. 1412-1417, 2629, Exhibit 179]

Rental of cars—Craft Service Inc.—[Stipulation, Tr. 1426-1430, Exhibit 180 and 181]

Long Island Lighting Co.—[Stipulation, Tr. 1430-1444, Exhibit 182]

Plumbing—Brookline Avenue—Moriarty and Sherman—[Stipulation, Tr. 1434-1437, Exhibit 183 and 184]

Home Carpet Cleaners—[Stipulation, Tr. 2149-2152, Exhibit 222 and 223]

M. Kavanagh & Son—[Stipulation, Tr. 2154-2156, Exhibit 224 and 225]

Laurel Floor Covering—[Stipulation, Hr. 2156-2158, Exhibit 226]

Jalousies—interest and late payment penalties—Franklin National Bank [Tr. 2159-2175; Exhibit 221, 227-229; M3157-3158]

[3831]

Boat Insurance—Parsons Insurance—[Tr. 2282-2289]

Tickets to a business association function—Dominick Londo—[Tr. 1994-1995, 2629; Exhibit 212]

Boat—interest paid re financing—Franklin National Bank—[Tr. 2175-2194; Exhibits 214-217, 230, 231; M3158 and 3159]

Vulpis Heating Corp.—[Tr. 2337-2341; Exhibit 243]

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Fuel Oil—[Vulpolene Corp.—Tr. 2342-2347-A; Exhibit 244]

Boat rental—[Eagle Fishing Pier—Tr. 2516-2525, 2538-2540, 2633; Exhibits 239-x-23 and 248]

Insurance premiums, general—Frank Romanzi, insurance broker [Tr. 1802-1805, 2213-2229, 2261-2263, 2496-2512, 2515; Exhibits 200-201-x-23, 232, 236, 238, 247; M3159]

Insurance premium—Arthur C. Lenitz [Stipulation, Tr. 2582-2584; Exhibit 252-x-23]

Dresses—Lillie Rubin [Stipulation, Tr. 2579-2582; Exhibit 251]

Rumplers Youth Center, Inc. [Stipulation, Tr. 2585-2587; Exhibit 254]

Dr. M. D. Roven [Stipulation, Tr. 2587-2588; Exhibits 255 and 256]

Rosedale Florist [Stipulation, Tr. 2589-2591; Exhibits 257 and 258]

Dr. George A. Rawler [Stipulation, Tr. 2591-2593; Exhibits 259 and 260]

Drug store purchases—Reid and Yeomans [Stipulation, Tr. 2594-2595; Exhibit 261]

Purchase—painting—French American Gallery—[Stipulation, Tr. 2595-2596; Exhibit 262]

Atlantic Television Co.—[Stipulation, Tr. 2596-2598; Exhibit 263-x-23]

Dr. Stanley Greenfield—[Stipulation, Tr. 2598-2600; Exhibits 264 and 265]

[3832]

Dr. Hyman Strauss—[Stipulation, Tr. 2600-2601; Exhibit 266]

Swim suit—Treasure Trove [Stipulation, Tr. 2602-2603; Exhibit 267]

Carol Dairy—[Stipulation, Tr. 2603-2604; Exhibit 268]

Bordens Farm Products—[Stipulation, Tr. 2604-2605]

Sylvan Dairy Inc.—[Stipulation, Tr. 2605-2606-A]

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Hardware for Brookline Avenue—F. M. O'Rourke [Stipulation, Tr. 2615-2616; Exhibit 277]

Joe Morley Electrical Co.—[Stipulation, Tr. 2607-2609; Exhibits 271 and 272]

Vinny and Rogers Meat Market—[Stipulation, Tr. 2609-2611; Exhibit 273-x-23]

De Rand Market—[Stipulation, Tr. 2617]

Bianchi Boat Basin—[Stipulation, Tr. 2611-2614; Exhibits 274 and 275]

Traffic Summons and Control Bureau—This covers payment of parking tickets by defendant during 1956-1958. The transactions were conducted by defendant who used for the purpose the name of a friend, Joseph Dantuono. [Stipulation, Tr. 1512, 2629-2631, 2639-2644, 2649-2653, 2655-2657; Defendant's Exhibit HX 185-x-23]

Pots and pans—Purchased from Kenro Sales and Service Corp. [Stipulation, Tr. 2618-2619]

The court finds that the defendant provided the funds which were used applied or disbursed in making the foregoing expenditures.

[10] Defendant's children, Joseph Jr. and Frank, aged 27 and 22 respectively, testified that their mother, defendant's wife, had never been employed, [Tr. 901-904, 1788-1791]. Pauline Trento, a friend for some eighteen or twenty years testified to similar effect, [Tr. 957-962]. In an admission record of the Unity Hospital, covering hospitalization of defendant's wife in December 1959, he declared that she was a housewife, [Exhibit 154, Tr. 2393-2398, 2406, 2411, 2634]. The Social Security Administration certified that its files disclosed no record reflecting any earnings by the wife, [Exhibit 7]. The I.R.S. found no income tax returns filed by the wife at any time, [Stipulation, Tr. 2621-2624].

The government's thorough investigation uncovered no evidence of receipt of income by her at any time. Exhibit 131, loan application which Mrs. Schipani submitted to the Manufacturers Trust Co. (see supra, fn. 8) provided the Government with a lead in the form of the representation she made therein to the Bank that she had been employed as a designer by the Rosetta Coat Co. for ten years.

When this lead was checked, however, it developed that she had never been so employed. Rosetta did not even employ a "designer" in its business, [Exhibit 170, Tr. 1229, Exhibit 131, Tr. 1728-1729, 1737]

Nor did defendant's children furnish any of the funds their father expended. [Stipulation as to part; Tr. 525, 903-906, 1788-1789]

[11] Adjustment items of addition are defendant's expenditures, [Finding of Fact 8, fn. 9, Exhibit 286/286-A]; loss on the disposition of the 1955 Ford car in 1956 and on the sale of the 1957 Ford in 1960. [See fn. 7, "Automobiles and Boat"]

Adjustment items applied in reduction consist of the following:

Statutory $50 exclusion from taxable income of dividends on the Gurney's Inn stock. These dividends had been applied by defendant to the acquisition of the stock and were accordingly charged to defendant in the asset schedule [Exhibit 281] as part of the investment. [Stipulation, Tr. 1033-1044, Exhibit 141, M3180]

Other items, all quite small with one exception, namely $1025.13 proceeds of a John Hancock Life Insurance policy, and requiring no special comment.

[Tr. 261-267, Exhibit 28; Tr. 2935-2936; Exhibit 280; Exhibit 54; Tr. 392-393, Exhibit 53; Tr. 737-739; Exhibit 104, M3181; Tr. 290, Exhibit 33; Tr. 2140-2141, 2286-2289, Exhibit 22]
[3834]

[12] The government's investigation educed no evidence, direct or circumstantial, that defendant had received any taxable loans, gifts, inheritances or other donations, non-taxable as income. It is true that the inquiry did not embrace the records of every one of the tens of thousands of governmental subdivisions and agencies, domestic and foreign, where information might have been sought. The amplitude of the inquiry it made was, however, consonant with what is found reasonable in light of defendant's failure to supply leads when solicited by government representatives to furnish them. (See M2964-2990 for conspectus of the problem created by defendant's noncooperativeness and the measures adopted to cope with the situation.) The conclusions testified to as arrived at by Mr. Masetti are accepted by the court as valid beyond a reasonable doubt.

[13] Although defendant received large sums during the indictment years and in earlier tax years now outlawed by limitations, he had no bank accounts in his own name in which these sums might be deposited with record preserved of the deposits. It is true that he maintained three accounts in the name of his wife, but these were small deposits in trust for his children. None of the large sums that passed through his hands moved into or out of these accounts. [Exhibit 71, 72, 74; Tr. 585-589, 593-596, 600-601, 606-608, M2971-2975]

He opened and maintained a safe deposit box, the only one the prosecution was able to locate, in the name of one Nancy Segreto. [Exhibit 142-146; Tr. 1044-1053, 1060-1061, 1062-1063, 1067-1074, 1076-1086, 1090-1102, 1806-1810, 2631-3631a]

His purchase of furniture from Selwyn-Pomeroy in 1956 was paid for with $16,000 in currency. [Exhibit 85-87; Stipulation, Tr. 704-705]

Payments totalling about $6,000 made by him in 1959 in connection with his son Joseph's wedding were likewise in cash. [Exhibit 158, 160-161, Stipulation, Tr. 1155-1162]

Other payments in cash during the indictment years were for rent during the years 1956-1960, [Exhibit 14, Tr. 160], mortgage payments in 1956 [Exhibit 17, Tr. 192], garage bills in 1957, [Exhibit 193, Tr. 1638], and medical expenses in 1957-1960, [Exhibit 139 and 152, Tr. 1031-1033, 1146-1149].

Defendant in countless instances during the indictment period paid his obligations with bank money orders purchased at [3835] various branches of the Manufacturers Trust Co. In accordance with the bank's procedures, which must have been known to defendant and, therefore, entered into his motivation, no record was kept by the bank of the identity of the purchaser, nor was any identification required for the use of the paper and its honor by the bank when the orders cleared for collection. In making the purchases of these instruments the defendant frequently signed the name of another person of his acquaintance and executed such other documents as the transaction demanded in the name of the person whose identity defendant had ad hoc assumed.

Illustrative of his procedures in such impersonation or signing are the following:

The bank money orders used by defendant to pay Associate Discount Corp. in 1956 were signed by him as "Anne Scalfani," his wife's maiden name. [Exhibit 81, Tr. 633-634]

Money orders to pay parking ticket fines were signed by defendant as "Joseph Dantuono" during 1956 through 1958. [Exhibit HX 185-x-23, Tr. 2629-2631]

In 1957 defendant signed his wife's maiden name on a money order which he used in paying the Manufacturers Trust Co. [Exhibit 134, Tr. 1007]

In 1958 defendant purchased a Chris Craft Boat using for the purpose on the title documents the name of a friend, Louis Esposito, who had no interest in the transaction. Defendant traded in another boat he owned, registration of which was not found by the purchaser-dealer. [Exhibit 214-217, Tr. 2024-2030, 2035-2052, 2268-2289]

In the years 1958 through 1960 defendant, continuing his masquerade in the boat transaction, signed the name "Louis Esposito" on the money orders with which he paid the installments due the Franklin National Bank. The bank had financed the unpaid balance of the "Esposito" purchase of the boat. [Exhibit 231, Tr. 2632] He also signed the name Louis Esposito on a bank personal money order given to Eagle Fishing Pier in 1959 in payment of boat rental he owed. He had posed as "Louis Esposito" when he rented the berth. [Exhibit 239 and 248, Tr. 2516-2525, 2538-2540, 2633]

He had used the name Nancy Segreto, wife of a friend, for the opening of a nominal account with the Dime Savings Bank so that he might be eligible under the bank's rules to rent a vault in the same name from the bank. (See supra, fn. 7 [3836] "Automobiles and Boat") During the indictment years he signed her name on two bank money orders (1957 and 1959) which he used to pay the box rental. [Exhibit 144, Tr. 2631-2631a]

He signed the name "Stephen Ucciardi" on bank money orders which he transmitted to General Motors Acceptance Corp. in 1960 to pay installments on an Oldsmobile purchased by his son. [Exhibit 178, Stipulation, Tr. 2632-2633]

The purchase of the 1955 Ford in that year and the 1957 Ford in 1956 in his wife's maiden name "Scalfani" have already been noted. [Exhibit 80, Tr. 628-635; Exhibit 130, Tr. 970-973, 989]. There is a strong suggestion in the documents that in arranging for

the delivery of the 1957 car he disguised his name by signing it "J. Shippe.". [Exhibit 130, Tr. 974-989]

During the years 1956 through 1958 defendant frequently used a 1957 Buick allegedly owned by Joseph Dantuono in whose name traffic ticket fines had been paid by defendant. This and more leads to the inescapable conclusion that the registration of the car to Dantuono was but a part of defendant's continuing game of hide-and-seek with the Internal Revenue Service and that the automobile despite its registration to Dantuono actually belonged to defendant. [Tr. 1498-1506, 1584-1589, 1603-1604, 1630-1638, 1656, 2639-2644, 2649-2653. Exhibits 193 and 278]

It is noted, however, as a point in defendant's favor that the court considers the alleged use by defendant of the name Joseph Scalfani instead of his true name in his membership of an athletic club at the Pierrepont Hotel as not sufficiently established.

Representations by defendant from time to time in pertinent documents as to employment (fictitious) serve as additional circumstances from which adverse inferences are drawn by the court. The facts are these:

From time to time when filling out statements for personal or business reasons defendant asserted a false history of continuing employment. The following examples of such deceptive practices are to be noted:

The National Ship Scaling Co. went into bankruptcy in 1949. The existence of its successor, the Universal Ship Scaling Co. was brief, ending its career in 1950 or 1951. [Tr. 667-670, 674] It was defendant's frequent deception, as will be demonstrated in a moment, to claim that he was employed [3837] by the Ship Scaling companies as a timekeeper, an employment which if genuine would have been reflected in the records of the Social Security Administration. There is, however, no record there of such employment. [Exhibit 135] In an application for life insurance defendant represented on 2/19/57 to the John Hancock that he was and for five years past had been employed as a timekeeper and chief pay clerk at the Universal. [Exhibit 44, Tr. 485, 488-490] On 9/30/57 in an application to the same company defendant again certified to such employment. [Exhibit 42, Tr. 454, 461, 465-466]

On 12/16/59 defendant once more alleged, in an admission record of the Unity Hospital, that he was employed as a timekeeper by a

Ship Scaling Co. (National). [Exhibit 154, Tr. 2393-2398, 2406, 2411, 2434]

During the years 1955-1958 defendant told his son Joseph, then a student at college, that he was a timekeeper in the ship scaling business, and that whenever the boy might he required to fill out an application at college which called for information concerning his father's occupation, he was to declare such as the employment of his father. [Tr. 1826, 1830]

Another fictitious employment which defendant on occasion certified was with the Riveredge Transportation & Storage Co. Its president Martello testified that defendant had never been employed by the company. In 1958 defendant, according to Martello, had merely asked him if he would "okay" defendant's credit if a bank to which defendant was applying for a loan should call. Defendant, however, in an FHA credit application dated 4/15/58 expanded the credit recommendation he had asked for to employment as a "solicitor" by Riveredge for the previous eight years. [Exhibit 229, Tr. 2166-2175] Later that year he repeated the misrepresentation in an application for insurance dated 9/17/58, this time, however, describing his employment as that of a salesman, and reducing its antecedent duration to five years. [Exhibit 45, Tr. 473-475]

Here, too, the Social Security records reflect no such employment as defendant claimed, [Exhibit 135]. Additionally, there is an obvious chronological conflict in the defendant's competing claims of simultaneous employment by the Ship Scaling companies and the Riveredge.

Defendant on occasion included his wife in false representations of employment. Thus, in 1956 he falsely stated to a broker in the course of applying for a policy of physical damage insurance in which his wife was to be the insured that his wife was employed by the Rosetta Dress Co., [Exhibit 236, Tr. 2229-2231, 2252-2260]. His wife's misrepresentation [3838] of a like employment would ordinarily be deemed to be *res inter alios acta* as to defendant and inadmissible. But her misrepresentation in a document cannot be considered as standing apart from the mass of evidence directly binding upon the defendant. Taken as a whole, such other proof provides a context which compels the inference that the wife's deception was an incident springing from a common understanding with her husband in a family transaction with a third party. It is merely cumulative of much that is clearly chargeable to him. It requires no straining at conclusions, therefore, to infer that

he was privy to the Rosetta falsehood of the wife which parallelled and fitted in with so much of his own devious procedures. [Exhibit 131, Tr. 994, 1000-1001]

[14] The court does not accept defendant's reading of Holland, with United States v. Massei, 355 U.S. 595, 78 S. Ct. 495, decided in 1958, four years after Holland, supplying a supporting gloss, that by a rigid dichotomy the government is given the choice in net worth prosecutions of demonstrating either a source of taxable income or that all sources other than that alternative are excluded. The cases are clear that the courts have been guilty of no such folly as to mark out with sharp definition for the guidance of the ingenious what form the prosecution's proof must take to sustain a prima facie case of tax evasion. See Holland, U.S. at p. 135; United States v. Massei, supra, in which the Supreme Court although affirming, rejected the Court of Appeals' (1st Circuit) holding and inferentially that in Thomas v. Commissioner, 232 F. 2d 520, 526 (1st Cir. 1956). Cf. Spies v. United States, 317 U.S. 492, 499, 63 S. Ct. 364, 368 (1943).

To the contrary of defendant's contention, the courts announce that the equation of guilt has three, not merely the two alternative elements noted. The third is the frame of reference in which the other two subsist.

No problem of sufficiency of proof exists, of course, when the taxpayer charged is shown to have a business the books of which do not reflect all his reportable income, even though all other sources from which nontaxable funds might be received are not excluded. Conversely, if by use of some as yet uninvented IBM machine every source of nontaxable income were duly taped and fed into the monster together with the accused's bertillonage, and the machine thereupon answered "Nothing found", inexorable logic would slot the defendant's receipts in the sole remaining unexcluded category, namely, that of income subject to its tax. Proof of a source in such situation would, if offered, be accepted, but as [3839] merely cumulative. This is the principle of Hoffman and Massei.

But these are procedures which could work only under laboratory conditions. They have no existence in the real world. Where no account books are kept and no returns are filed by the alleged delinquent, one has at best only the fragmentary and in other contexts not too persuasive evidence of what may be "likely" sources. With leads lacking, a search, with exhaustion of sources less than mathematically

complete, nevertheless can, and here does, beyond reasonable doubt make out a prima facie case. For then the third element, a tertium quid, comes into play. It is not to be defined and its reach is as unlimited as is the human ingenuity in contriving that which is fraudulent and deceptive which it must counter.

Nor will this court imprudently—(in light of the cases just cited) —undertake to provide a definition or to delimit the bounds for this elusive element. The cases illustrate, rather than verbalize its attributes. It is easily recognizable when present, and its presence lends corroborative strength to that which would otherwise be deemed an insufficient showing of either of the other two elements. Thus, *unexplained* increases in net worth alone with neither source effectively shown nor possible nontaxable origins universally negatived would not meet the standard of proof required upon which the court might base a conclusion that increments are attributable to income required to be reported. But an exculpatory explanation offered by the accused is when later demonstrated to be false not wholly cancelled and disregarded. What defendant has originally adduced, is availed of by the prosecution, serving to be transmuted under well-established rules of evidence into a circumstantial and affirmative inference marking the increase as reportable but unreported income. (United States v. Adonis, 221 F. 2d 717, 720 (3d Cir. 1954); United States v. Ford, supra, 237 F. 2d at p. 63.)

Defendant at p. 102 in his post-trial brief cites as helpful to his position United States v. O'Malley, 131 F. Supp. 409 (E.D. Penn. 1955) wherein the court acquitted, by arguing that here as in O'Malley (p. 412) the government "has established a lack of explanation rather than a false explanation" by the defense.

We cannot agree. The defendant was well within his constitutional rights both before indictment and during trial in electing to offer no explanation and to provide no leads. But his extraordinary behavior in relation to receipt and disposition of money, and his procedures in transactions affecting assets which were incontrovertibly his own, his camouflaging of these transactions as those of others who had no interest in them,—all are circumstantially the equivalent [3840] of the grossest deception and falsehood he might have articulated in attempted self-exculpation. "The wicked flee when no man pursueth." If he fled, he fled only the tax gatherer. The broad principle is expressed by Wigmore in his "Evidence", Vol. II, § 281, 1964 Pocket Supplement, p. 45, as follows:

> "No useful purpose would here be served in undertaking to make further classification of the innumerable instances of conduct, both verbal and non-verbal, of a party indicating a consciousness of guilt. The common experience of mankind in dealing with the ordinary affairs of life should offer, it would seem, an indispensable test in making the determination as to whether or not the particular conduct encountered is calculated to raise the inference of a consciousness of guilt. And in this connection, common experience dictates that often times while an affirmative or a negative act of a party may not in and of itself justify such an inference, considered in the light of the attendant facts and circumstances, an entirely different result is warranted."

[15] Scattered bits of testimony strongly suggest the ownership by defendant of some restaurant business, or possibly a specific restaurant, the Casa Bianca at 1005 4th Avenue, Brooklyn, or at least an interest in it, as a likely source of his income. On May 22, 1961 his son Frank (so the boy testified), having occasion to fill out an application for employment, represented in the document that his father, the defendant's "occupation" was that of "restaurateur," and that the parent's firm and its address were "Casa Bianca, 1005 4th Avenue, Brooklyn." This, the son continued, was pursuant to the father's instructions. [Tr. 908-927]

On June 9, 1961 the same son had filled out an application for a fidelity bond. At the foot of the sheet which bore his signature were affixed the signatures of defendant and his wife as indemnitors of the obligations which the son undertook by the instrument. In the body of the page thus attested by the defendant appears the following:

"Name	*Occupation*
Father—Joseph Schipani	Restaurateur"

[Stipulation, Exhibit 114, Tr. 913]

[3841]

Additional testimony on the subject of defendant's ownership of a restaurant is supplied by the gardner Biamonte to the effect that in 1959 or 1960 defendant had told him that he would like to buy a plant for his restaurant. [Tr. 348-351, 378, 380-381]

Jeanette Corwin, a friend of the Schipani's for some 25 years gave testimony which the court has accepted only in part. The remainder

is rejected, but in light of its manifest and purposive falsity intended by the witness to aid defendant, it is upon evaluation and in its context found by the court to provide an evidentiary basis for an inference, hereinafter discussed and formulated, as to what approximately was the true situation which the witness sought to distort or withhold.

Indisputably defendant on at least one occasion—in 1959—had evinced a marked interest in benefitting the Casa Bianca financially. This he had done by urging Mrs. Corwin to stop in with her husband at the restaurant whenever they were in the neighborhood, and to divert her patronage from the Hamilton House to which she had been accustomed and to resort to the Casa Bianca. [Tr. 1269-1276] The significance of his interest which might otherwise have been slight is found in another incident which she related, namely, that on a prior occasion, the date of which is unclear, defendant had told Mrs. Corwin that he had an interest in a restaurant, the name of which he did not mention. In answering questions of the prosecutor directed toward having her fix a date for the conversation, she gave responses which the court finds utterly incredible. After many protestations that her memory for dates was poor, to the accompaniment of endless inconsistencies and self-contradictions, she finally came to rest on a claim that the conversation in the course of which defendant's admission had been made and which had by her estimate consumed no more than ten minutes, was engaged in twenty-two or twenty-three years before. It could have been twenty-four or twenty-five years she was prepared to concede but not as few as twenty-one.

That the witness was lying was patent not alone from the content of the testimony she gave, but also from the manner of its delivery. Called by the prosecution, she was endlessly evasive, unresponsive and seemingly unable to understand the simplest questions put by the U. S. Attorney. Much of this air of confusion and ignorance was in the court's view mere pretence, for she exhibited no such difficulty in answering defense counsel when he later took over the inquiry. To him she delivered short, crisp and relevant replies.

[3842]

The court accordingly, recognizing that her objective was to retrogress the incident to a past as remote from the indictment years as possible, draws the inference as the only reasonable one to be distilled from the evidence, that the conversation in fact took place in a much more recent period than she assigned to it, and under

circumstances which left a lasting impression upon the witness. [Tr. 1239 et seq. passim]

After having laid a foundation for the impeachment of this manifestly hostile witness by interrogation concerning answers she allegedly had given in the course of an interview by Agent Robert Wynne less than a month before the trial, the U. S. Attorney called Mr. Wynne to the stand and elicited from him the information that Mrs. Corwin had at such interview reported the incident as having occurred about ten years earlier, "during the 1950's." [Tr. 2874-2877]

The agent's testimony was offered and received for impeachment purposes only. If credited it might cancel out the witness' attempt to relegate the conversation to a remote chronology which might deprive it of all probative value. The court in its discretion is authorized to admit the testimony for such limited purpose even though the witness thus impeached has been called by the very party which seeks to nullify the effect of so much of the testimony elicited as conflicts with earlier extrajudicial statements. [United States v. Freeman, 302 F. 2d 347 (2d Cir. 1962); United States v. Fancher, 319 F. 2d 604 (2d Cir. 1962); Stevens v. United States, 256 F. 2d 619 (9th Cir. 1958); Ellis v. United States, 138 F. 2d 612 (8th Cir. 1943); Asaro v. Parisi, 297 F. 2d 859 (1st Cir. 1962), cert. denied 370 U.S. 904. Cf. Hickory v. United States, 151 U.S. 303, 14 S. Ct. 334 (1898); United States v. De Sisto, 329 F. 2d 929 (2d Cir. 1964), cert. denied 84 S. Ct. 1885.]

The agent's testimony is, moreover, cumulative insofar as its effect is to call into question the portion of Mrs. Corwin's testimony bearing upon the date of the conversation, and even without having received it the court would have made the evaluation indicated in this footnote. The court had already given clear indication of such disbelief of Mrs. Corwin's purported chronology. (See Tr. 2747, 2748, at which point before Mr. Wynne had testified the court had remarked that "I will take with more than one grain of salt her claim that she can remember a ten-minute conversation which took place not as [recently] as 21 years ago, but it had to be more than 23 years ago." The witness had in fact given as the likely outer limit of this brief talk a date twenty-five years before.)

[3843]

Finally, that defendant was frequently at the Casa Bianca restaurant and at odd hours not necessarily related to meal times is borne

out by the testimony of a number of witnesses. Jerry Gross [Tr. 1880-1881]; Charles Perla [Tr. 1710]; Ralph Schipani [Tr. 888-893]; Joseph Dartley [Tr. 1418-1422]; Louis Esposito [Tr. 2273, 2274]; Pauline Trento [Tr. 963-964]; and Regina Attanasio [Tr. 2527-2538, 2620-2621, Exhibit 248]. The last witness mentioned produced a record book of her business (rental of slips for small pleasure craft) in which at page 93 appears the address of the Casa Bianca, a telephone number, the years "1959 to 1960", the words "of Rest." which last expression the witness construed to be an abbreviation of "restaurant", and the address of the Long Beach property, "94 Brookline (sic) Ave." The information according to the witness had been supplied by defendant. The name he used was an alias: L. Esposito. It appeared on the page in question.

[16] That defendant had another likely source of income from activities in labor relations is supported by no direct evidence, but circumstantial proof of some force is not wanting.

Victor Matrunola, Vice President of Colonial Realty Co., while engaged in procuring a $10,000 mortgage loan from a private lender for defendant prepared a work sheet, Exhibit 112-x-100, on which he jotted down along with other random notations information pertinent to the credit of the borrower, nominally defendant's wife, the record owner of the Brookline Avenue property. The loan, however, was being secured for defendant. [Tr. 733] The mortgage application, Exhibit 111, dated 3/10/56 was signed by both defendant and his wife. After the transaction closed the interest and amortization payments during 1956-1960 to Colonial were all made by personal money order signed by defendant, although some thus signed purported to carry the wife's signature. [Exhibit 109, Tr. 766]

On the exhibit is a notation which the court, on the basis of an analysis of Matrunola's testimony and that of Dominick Longo, defendant's attorney, aided by reasonable inferences it draws from the evidence as to the probabilities inherent in the situation thus disclosed, interprets as a record of a contemporaneous, i.e. in 1956, representation, personally made by defendant to Matrunala, that defendant was a labor consultant with an income of $12,500 a year from such activity. [Tr. 769 et seq., 1995-2001, 2014-2018] Two incidents lend color to the Matrunola memorandum.

Appendix B—Opinion by Rosling, U.S.D.J.

[3844]

In 1954 Martin Leonard, attorney for Giovanni's Restaurant, told defendant of difficulty his client was experiencing in negotiating a collective bargaining contract with the Chefs, Cooks and Pastry Workers Union. Defendant promised Leonard he would speak to a "friend" of his at the union to see if the friend could help. A few days later defendant told Leonard that the contact had been made and that Leonard should speak to the union again about the agreement. The contact seemed to have been productive, for a new contract was closed with little difficulty soon thereafter. [Tr. 1109-1128]

Serving with the incident just noted to bracket the indictment years and sufficiently close to their end to cast a retrospective illumination upon defendant's similar activities within that interval are two related episodes, both occurring in 1961, and involving one Jerry Gross and the troubles of his company, the Kleen Linen Service, Inc., with his union. Gross was in the laundry (linen supply) business, servicing the Casa Bianca and would on occasion see defendant there. Gross acknowledged no more than a nodding acquaintance with defendant, yet although only after much equivocation and fencing, Gross admitted to having had a conversation with defendant in the restaurant in 1961 about his problem. His testimony that Schipani was only one of a group then present, and that his remarks were addressed to the entire group is scarcely believable in light of the subsequent individual interest of defendant in Gross' problem. "On one occasion I asked Mr. Schipani's advice regarding picket lines," Gross testified.

In October 1961 Gross called defendant on the telephone at the Casa Bianca and asked him to come over to his place of business. There in his office Gross disclosed his union difficulties to Schipani who after hearing him out declared—so Gross testified—that he couldn't help. It wasn't Schipani's field—his business. Gross claimed to have spent 15 or 20 minutes in his recital to defendant before the latter said he could not help. [Tr. 1869 et seq.]

Leonard and Gross both professed that no money had passed hands in their respective consultations with defendant. The incidents, however, as the witnesses narrate and embroider them give off that characteristic effluvium which customarily envelops back-door labor-management negotiations. The court is not persuaded that one so slightly known to the employers concerned before he evinced an interest in their problems was altruistically motivated in his interest.

[3845]

[17] On the other hand, the contention pressed upon the court by the prosecution that the defendant in preindictment "admissions" made to government agents, who testified concerning them, that he was engaged in lucrative illegitimate activities, is rejected as lacking evidence of the requisite probative quality. The admissions are vague and uncorroborated—(See Smith v. United States, 348 U.S. 147, 156, 75 S. Ct. 194, 199 (1954); United States v. Calderon, 348 U.S. 160, 164, 75 S. Ct. 186, 188 (1954))—and the testimony which embodies them does not persuade beyond a reasonable doubt that the specific words ascribed to the defendant were articulated by him and with the intent ascribed. Finally, with these doubts regarding the evidence troubling the court as trier of the facts, uncertainty as to the legal reach of Escobedo v. Illinois, 378 U.S. 147, 156, 75 S. Ct. 194, 199 (1964), admonishes it to give the defendant the benefit of the doubt in this area of the proof. Justice White's comment, though a dissenting and exaggerated stricture upon the Escobedo majority's views, nevertheless by its very exaggeration warns that the sweep of the opinion may well be tidal. The justice remarks with measured asperity that in light of Escobedo "defendant is constitutionally entitled to a lawyer before, not after, he commits a crime, since it is then that crucial incriminating evidence is put within the reach of the government by the would-be accused."

[18] Government Agent Rosman, using the figures provided by the Masetti schedules computed the tax due for each of the indictment years. The elements entering into the final figure fixing the respective tax liabilities are set out in Exhibit 290 and are comprised of the following: Gross income [Exhibit 285, Tr. 3236-3237]; Deductions [Exhibit 283, 290, 291, 292, Tr. 3237-3247, 3293]; Exemptions [Tr. 3249-3250]; Taxable Income [Tr. 3250]; Tax on line 5 [Tr. 3250]; Dividends Received Credit [Tr. 3250-3251]; Tax Liability [Exhibit 3, Tr. 61-66; Exhibit 290, line 8, Tr. 3253]. Deductions set out in detail in Exhibit 291 are grouped, appropriately, under contributions, interest, taxes and medical expenses.

[19] Wilfulness is clear. Much more than wilful failure to file a return, supply information or pay the tax, a misdemeanor under 26 U.S.C. § 7203, is here present. A long history of nonfiling coupled with devious procedures of deliberate concealment of income by use of the names of others, including his wife's maiden name, by absence of records, cash transactions, the use of bank money orders, and other

devices, in their summation justify a finding of a wilfull attempt to evade and defeat the income tax imposed by the Internal [3846] Revenue Code in violation of § 7201. See Holland v. United States, supra, 348 U.S. at p. 139; Spies v. United States, 317 U.S. at p. 497; United States v. Holovachka, 314 F. 2d 345, cert. denied 374 U.S. 809; 83 S. Ct. 1695; Cooper v. United States, 321 F. 2d 274, 277 (5th Cir. 1963), cert. denied 375 U.S. 964, 84 S. Ct. 482.

[3847] APPENDIX

MOTION FOR A MISTRIAL BECAUSE OF ALLEGED IRREGULARITY IN THE PROCEEDINGS UNDER 18 U.S.C. § 3500.

Defendant, in his brief after trial, pp. 21-24, contends that error inheres in the circumstance that "several conferences [were] conducted by the court in chambers privately with the government attorney and out of the presence and over the objection of the defendant and his attorney, in connection with the screening of '3500' materials, all of which was prejudicial and deprived defendant of his rights of due process of law under the fifth amendment and of confrontation under the sixth amendment."

The subdivision of the memorandum concludes, without citation of supporting authority, (p. 24) with a hesitant motion for mistrial reading, "This we are most reluctant to do, but, nevertheless, in order to preserve our position in the event of an appeal, we do hereby respectfully (and reluctantly) move for a mistrial upon the grounds stated in the above subheading." These grounds are those quoted in the opening paragraph of this appendix.

The reasons for the denial of the motion (supra p. 3) follow:

[3848]

EXPRESS CONSENT WAS GIVEN BY DEFENSE COUNSEL TO THE PROCEDURE FOLLOWED.

The procedure to which defendant claims to have "objected" involves only the Masetti material, the nature of which created grave and difficult problems for the court in

its processing under the statute. Mr. Lefkowitz was thoroughly and happily familiar with this court's liberal attitude respecting a turnover of § 3500 material to the defense. He had only recently before the instant trial been counsel for one of the defendants in another trial over which this court presided. (See infra, p. 62) His express consent which was here given only after detailed explanation of the steps the court proposed to take could not have resulted from confusion or misapprehension.

The situation first arose at the conclusion of the government's direct testimony of Agent Wynne concerning interviews with the witness Corwin. Mr. Wynne had made no notes, nor had Mr. Masetti who was likewise present at the interviews done so. Mr. Ruby, the third of the government personnel in attendance, had made some attorney's jottings. These he proposed to turn over to the court, alleging, however, that they did not fall within the definition of a statement under § 3500(e). The notes were not in his file in court. He thought they might be in his office. Some colloquy not pertinent to the immediate problem then ensued. The record then continues [Tr. 2896],

> "Mr. Lefkowitz: Well, your Honor, I could represent to the Court at this time that if Mr. Ruby has no notes with reference to the [3849] particular interview, and if they are—if they are not there, well, that is the end of the defense counsel's cross-examination.
>
> "The Court: Why don't you go a step further? I think you are going to suggest that you have Friday clear.
>
> "Mr. Lefkowitz: Yes, that is clear.
>
> "The Court: Well, suppose we do this, what I

originally thought of doing I will do in this context. Mr. Ruby, you go to your office when we recess here and I will be in Chambers, and if upon your review of such notes as you find you feel they do not qualify under 3500, then under the statute itself *I am required to meet with you privately*, that is, *to the exclusion of the defendant's counsel* and review those things and make my own determination.

If I determine in that situation that the notes are not producible, or that there are no notes at all, then we can recess completely tomorrow. Is that what you had in mind?

"Mr. Lefkowitz: Yes. That is what I was going to—

"The Court: You will leave a number, Mr. Lefkowitz, where you can be reached—

"Mr. Lefkowitz: I will be at my office.

"The Court: (Continuing)—within the next hour or so, so that you can be apprized of whether you are required to return here tomorrow morning or not.

"Mr. Lefkowitz: Very good.

"The Court: I will, of course, if the notes are turned over to me for in camera inspection—I will of course have them routinely marked as an exhibit—a Court's Exhibit for Identification—so that they may be preserved in the event that [3850] there should be an appeal from that determination.

"Mr. Lefkowitz: If that will be so, or if that were to be so, then we would reconvene on Tuesday?

"The Court: Tuesday, yes."

It developed when Mr. Ruby located the notes and turned them over to the court as arranged that upon a mere glance the single sheet [Court's Exhibit B] was found obviously not § 3500 material and Mr. Ruby was accordingly asked

by the court to notify Mr. Lefkowitz that there would be no session on the 19th, the following day.

On the next scheduled trial day, the 23d, an office associate reported that Mr. Lefkowitz was too ill to come to court. The following day the attorney was in attendance, ailing and carrying a cane.

On February 24 Mr. Masetti, the government's "cleanup" witness, concluded his long and involved direct testimony with voluminous and complex investigatory and statistical data for reference and support. [Tr. M2937-3187] Mr. Lefkowitz a moment earlier at p. 3186 had asked, "Have I been furnished with all 3500 material of this witness?"

Mr. Ruby after some reference to the content of government's Exhibit 287 (the sealed in camera material) announced the government's position that "as to certain portions of the report, I would not turn them over to Mr. Lefkowitz unless directed by the court to do so." [Tr. 3187]

At this the court declared its position and proposed [3851] procedure as follows:

> "The Court: Well, the Court never makes a final direction. It does what 3500 says. 3500 gives you [addressing Mr. Ruby] a choice. And part of the choice is the abandonment of the prosecution or part of it anyway. This calls for an in camera proceeding with the defendant and defense counsel not present because a disclosure made to the Court might disclose the very thing to the defendant which the Government is entitled to have withheld."

Mr. Lefkowitz without demurrer to the court's indicated action argued at some length [Tr. 3188-3191] that he was entitled to the full report as constituting the statement of "one who prepared this case against my client." [Tr. 3189] Mr. Lefkowitz then [Tr. 3191] turned abruptly from the subject to move for an examination by the court "of the grand jury minutes insofar as testimony given by Mr. Masetti," and for permission "from the Court to use such portions thereof, or all of his testimony for purposes of cross-examination insofar as it affects the testimony that he has given." When Mr. Ruby indicated some reluctance to consent, the court made the following observations which are quoted together with colloquy of counsel at greater length than might otherwise be the case were it not for the fact that what was said provides a context for the language, here underscored for easier identification, relative to the § 3500 procedure about to be entered upon:

> "Now, courts are completely cognizant of the fact that this rule of disclosure only where inconsistencies appear is often unfair in its operation and impossible of fulfillment [3852] because what may appear to be no inconsistency to the judge sitting here with limited familiarity with what is involved and what is yet to come may present to resourceful counsel the grossest sort of inconsistency. So my attitude is that if there is any—if there is no serious prejudice that will come to the Government through a disclosure, that the minutes need not be searched for possible inconsistencies. On the other hand, if the inconsistencies are apparent, the Court surely would not wish to withhold the minutes from counsel.
>
> Mr. Ruby: May I have a moment, your Honor?

> The Court: Suppose we do this? Suppose you take a couple of minutes time reexamining the Grand Jury minutes, which I see from the document you hold in your hand are not too lengthy, and then if it should be appropriate to turn them over to Mr. Lefkowitz, he can spend the time reviewing the Grand Jury minutes while we [indicating Mr. Ruby] are in chambers in camera considering the 3500 application."

Further colloquy in open court between the court and Mr. Ruby ensued interrupted by conferences out of court by Mr. Ruby with the U. S. Attorney following which he reported back in open court. Thereupon the court once more made clear its contemplated procedure to all, including Mr. Lefkowitz and his client, as appears from the following further excerpt from the minutes: [Tr. 3199]

> "The Court: Well, suppose we [again indicating Mr. Ruby] adjourn to chambers and I will consider the grand jury minutes first, so that, they being far less voluminous—they may be made available to Mr. Lefkowitz and then *we* will decide whether sufficient time remains tonight for a disposition of the 3500 material.
>
> All right, *the reporter and the Clerk will please come with the Court to*—we will use the jury room for the in-camera proceeding.

[3853]

> Mr. Ruby: *We* will first determine the grand jury minutes?
>
> The Court: That is right. So will you wait, Mr. Lefkowitz. *We* may have quick work for you on the grand jury minutes, but from the size of the 3500 material, it is not likely in that case.

(Thereupon ensued an in-camera session with the Court, Mr. Ruby, the reporter and the Clerk present.)".

The bracketed description is the reporter's language reciting what was observable and observed by all present in the court including Mr. Lefkowitz and the defendant, namely, the exit from the courtroom of the judge, the clerk, the reporter and Mr. Ruby through the private door beside the judge's desk leading to their announced destination, the jury room.[A 1]

On February 26 at the next scheduled open session of the court, the incidents and results of the § 3500 proceedings respecting the Masetti documentation were disclosed and placed upon the record by the court in colloquy with both counsel. The transcript pp. 3207-3220 is too lengthy for convenient quotation, and excerpts would lose something of their significance in removal from the context. That defense counsel was not evincing even a minimal dissatisfaction with the court's procedure of which he had throughout been kept abreast is manifest. That his client was receiving through the court's greater freedom of action in the procedure adopted much that a court might otherwise without abusing its discretion or committing clear error have refused him because no basis for disclosure was discernible [3854] from its mere perusal of the tendered document was equally clear. [Tr. 3210]

A reference to Mr. Ruby's attendance that morning in camera appears at Tr. 3208. The court noted [Tr. 3210] that the liberal turnover was in part prompted by Judge

Friendly's wise comment in United States v. Borelli, 336 F. 2d 490, 497, concerning the imperilling of convictions by caviling over the delivery of 3500 material which could by surrender "not add appreciably to the strength of the defense." The afternoon, the court announced, would be reserved for the testimony of a witness other than Mr. Masetti. This would afford Mr. Lefkowitz the entire weekend for review of the Masetti § 3500 papers now made available by the in camera proceedings described, in preparation for the cross-examination of Masetti by Mr. Lefkowitz. [Tr. 3213] On Monday the court proposed to call Mr. Masetti as its own witness in a § 3500 proceeding[A 2] so that Mr. Lefkowitz could cross-examine him without being subject to any impediment which might limit the attorney's right to a broad interrogation, [Tr. 3214], as might have been the case were Mr. Lefkowitz to be required to place the agent on the stand as his own witness. That such questioning by Mr. Lefkowitz might well be required appeared to the court from the fact that Exhibit 287, notwithstanding its bulk, referred to, but did not annex numerous supporting documents. Additionally a host of persons who presumably had been [3855] interviewed by Mr. Masetti and whose interviews formed in part a basis for his report were merely listed in the Exhibit. In this connection the court now addressed Mr. Lefkowitz, saying [Tr. 3218], "I will give Mr. Lefkowitz an opportunity to answer or to comment, and if he wishes he may. I saw him nodding his head, indicating that—"

Mr. Lefkowitz's reply was, "I appreciate that, your Honor, but I just want to inquire whether the entire report

with the parts deleted, are made a Court Exhibit." The court assured him it had been and that a stenographic record of the proceedings had been made and that the Clerk had been present. The court then in summation asked [Tr. 3220], *"So is the arrangement satisfactory?"* to which Mr. Lefkowitz replied, *"Yes, your Honor."*

The colloquy which now followed was rather long and dealt with an unrelated matter of proof. The balance of the day, as earlier agreed, was consumed in the testimony of Mr. Rosman, the government agent who had computed the tax due for the indictment years (See fn. 18, p.43 supra). Recess was then taken over the weekend to Monday, March 1.

On that date the court announced its plan to proceed with the conclusion of Rosman's examination. This would be followed with the Masetti § 3500 inquiry (in open court) "unless Mr. Lefkowitz has other ideas." Mr. Lefkowitz declared he had none. [Tr. 3290] Mr. Rosman then testified briefly. [3856] When he had concluded Mr. Ruby, announcing that he had a few other 3500 items that he wished to have marked and turned over to defendant, all without in camera processing, proceeded to do so [Exhibits 293, 294, 295, 297 and 198 for identification].

The court thereupon inquired of the government attorney whether any of these documents now made available by him to the defendant were among those which had been merely enumerated in the General Exhibit 287 for Identification that Mr. Masetti had used as his master file, but which were not annexed thereto. Being informed by Mr.

Ruby that the Exhibits (293 through 298) just delivered to the defense were not mentioned in 287 but were in addition to those listed therein, the court decided to "soften up" Mr. Ruby before turning him over to defense counsel for § 3500 inquiry as to what these subsidiary documents referred to in Exhibit 287 were and as to such other matters as might relevantly be the subject of interrogation. As will be noted in the discussion which immediately follows the court in this approach not only had the exhortation of the Court of Appeals of this circuit to serve as a guiding principle, but itself cited the most recent of the cases which embodied it. The first of the cases noted [Tr. 3298] was United States v. Ellenbogen, 341 2d 893 (2d Cir. 2/25/65) the slip memorandum in which the court had received only the preceding Saturday, two days earlier. From the opinion in Ellenbogen written by the then Judge Marshall [3857] the court quoted several excerpts. The court remarked in the context of its discourse that "Judge Marshall refers us to United States against Borelli, which I believe I cited to you gentlemen last week." In Borelli (supra, p. 52), it may be recalled, Judge Friendly inveighs against the folly of the U. S. Attorney in jeopardizing hard-won convictions by a scrimping approach to what is Jencks Act-discoverable. Noting that Judge Marshall had ruled that a sufficient nexus to the direct testimony of the witness affected is shown to exist which requires disclosure when the document in question may be useful, in the opinion of the defense, rather than of the judge, even though only as an auxiliary to cross-examination, this court commented [Tr. 3301] that with "the Court of Appeals breathing rather warmly on the judicial neck of the District Judge,

the Court will not be niggardly or unduly restrictive in considering what should and should not be produced."

Mr. Lefkowitz then requested that he be permitted to take a statement from Mr. Ruby under § 3500 procedure. The Court, of course, granted the request, whereupon Mr. Lefkowitz for the first time disclosed that he found the § 3500 procedure objectionable.

RELATIONSHIP OF THE OBJECTION TO THE THEN PENDING APPEAL IN UNITED STATES v. PERSICO, et al, SUBSEQUENTLY DECIDED AND CONVICTION REVERSED, 7/23/65, ON OTHER GROUNDS.

The § 3500 interrogation which ensued consisted of but two questions put by Mr. Lefkowitz to Mr. Ruby. Mr. Ruby's response supplied Mr. Lefkowitz with no information [3858] that he and his client did not already and contemporaneously with the events know from words spoken and things seen and to which the attorney had given express assent. The court justifiably felt, as the record surely must persuade, that it had more than mere acquiescence on the part of the defense in the routine followed, indeed express and gratified approval. The gratification was understandable in that unless the court's open statements were to be belied by its clandestine contrary conduct, which it was imprudent enough to have recorded by a clerk and court reporter for appellate court review, the court had manifested an attitude most liberal toward disclosure.

The two questions put by the defense attorney to Mr. Ruby and his responses were these [Tr. 3303]:

"Q. Were you in Chambers with Judge Rosling to indicate to the Court which of the portions in 287 you found objectionable to turning over to me? A. Yes.

Q. And how long were you with the Judge? A. I think were were there on two occasions, the first time I would say about 45 minutes and the second time, it must have been perhaps an hour and a half."

After some further brief colloquy between the court and Mr. Ruby, Mr. Lefkowitz now and for the first time noted his objection that the presence in camera of Mr. Ruby without both defendant and counsel likewise in attendance was legally impermissible. Counsel did not follow the overruling of his objection with a motion for a mistrial, but abandoning the [3859] § 3500 interrogation, entered at once upon the cross-examination of Mr. Masetti as part of the trial proper.

A judge, sitting as the trier of the facts is assumed to have disregarded, unless his decision of the case affirmatively demonstrates the contrary, illegal evidence and extraneous considerations. So that there can be no question that this court has honored the precept implicit in such observation, the court gives such assurance. Of greater concern to defendant, surely, is the fact that with defendant waiving a jury the court's mere perusal of the sealed Exhibit 287 required in the performance of its duty under § 3500 brought to its attention matter which if the court failed to omit it from its consideration would be highly prejudicial to the defendant. This matter, too, the court represents it has for the purposes of its role as trier of the facts relegated to the lumberroom reserved for matters that

never happened. Some note will be taken in a later division of this opinion under an appropriately descriptive caption of the content of Exhibit 287. Immediately, however, our attention is turned to a consideration of the post-trial motion for a mistrial and its link with the fourth Persico trial and the appeal therein then still undecided

DEFENDANT'S MOTION FOR A MISTRIAL FIRST MADE IN ITS POST-TRIAL MEMORANDUM (P. 24) AND ITS RELATIONSHIP TO UNITED STATES V. PERSICO.

Mr. Lefkowitz's cross-examination of Mr. Masetti [3860] occupies pages 3309 through 3435 of the Transcript. Not once did he in the course of such interrogation refer to the in camera Exhibit 287 or indicate that he had used it in preparation for the Masetti questioning. A fortiori, he made no inquiry as to the contents of the numerous unannexed documents of which it provided an index, nor called for their production. Nor did he seek enlightenment as to the nature of the inquisition which the government representatives had directed to the large number of individuals whose names alone were catalogued in the document. Nor did he probe as to the contents of the statements, whether signed or merely interview reports, which according to government practice must have existed. He could have called for their production, without obligation to introduce them after his ex parte study of their contents, but did not do so.

At the conclusion of the prosecution's case which followed Mr. Masetti's brief redirect examination by Mr. Ruby—(there was no recross)—the government rested.

The following day, March 2, defendant made a number of motions, none of which remotely had reference to his objection to the Masetti § 3500 procedure, and when these were all denied, absolutely or with qualification, he too rested. [Tr. 3469] Defendant's counsel thereupon renewed all motions made by him at the prosecution's close and an additional motion for a judgment of acquittal. Decision was reserved by the court pending submission of briefs and possible oral argument. [3861] No motion for a mistrial on any ground had been urged, nor did the court leave open the opportunity to so move. [Tr. 3470-3486]

It is in defendant's post-trial brief (page 22) that we first find a motion for mistrial grounded on the § 3500 irregularity. He had not found, the attorney acknowledges, "any decisional authority concerning such private in camera (sic)* practice. However, we are informed by Mr. Lefkowitz, "that this same issue is presently awaiting decision by the United States Court of Appeals for the Second Circuit in United States v. Persico, et al."

Professing to find a grave potentiality of prejudice to a defendant in the procedure adopted, counsel proposes as an alternative (brief p. 23), "that if a Court feels the need of some kind of clerical assistance from the prosecutor in screening the '3500' materials, the Court on its own proper judicial initiative could invite defense counsel to be present

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* Black's Law Dictionary, Fourth Edition, defines "In camera" as, "In chambers; in private * * *." Webster's Third New International Dictionary, Unabridged (1961) gives as the meanings of the phrase: "1. in the judge's chamber [the trial was held *in camera.*] 2. in private: PRIVATELY, SECRETLY." [Italicized matter in original is here underscored; capitals here also in original]

under proper safeguards to insure that *the defense should not learn* the contents of '3500' materials to which the court might [3862] find the defense unentitled." (underscoring supplied as indicating the fundamental and as yet unresolved antinomy which has confronted the courts for generations in dealing with the conundrum of how to inquire when the ultimate ruling is to be "you need not disclose.") (See infra, p. 97.)

Finally and again without citation of authority which the court might find useful or enlightening, defendant's brief argues that the procedure reprehended "would seem to work a clear violation of the Sixth Amendment's right of confrontation * * *" and a "denial of the due process right of fair trial by a fair and impartial tribunal."

Persico Decision

Persico and his codefendants were charged with a single incident of highjacking. They were tried four times. The first trial (Mishler, J.) ended in a disagreement of the jury as to all six defendants on 5/13/61; and the second (Abruzzo, J.) in a conviction on 6/19/61 of five on both the substantive and conspiracy counts, and of the sixth, La Fante, on conspiracy alone. The Court of Appeals reversed, 305 F. 2d 534 (7/13/62) largely because the trial judge had kept too tight a rein on defendant's cross-examination of Vaccaro, the prosecution's "uncorroborated" and thoroughly villainous witness, who had turned states evidence when facing endless years of imprisonment for his own misdeeds.

[3863] For the third trial, only five of the defendants were able to answer "present", the sixth defendant, Magnasco, having met his end by unfriendly hands on 6/16/61. Nor was this untoward event unique in this series of trials. Although Judge Bruchhausen on 5/7/63 began the third trial with all five surviving defendants facing the jury, on Monday, May 20, summations having been completed the preceding Friday and with the judge about to charge the jury, it appeared the defendant Persico was absent and indisposed. Over the weekend he had been the target of five bullets fired from the gun of one whose aim was poorer than his intent. All five bullets had, indeed, found their mark, but miraculously Persico continued among the living, although his guardian angel had been less considerate of his companion of the moment, not a defendant here charged.

A mistrial as to three of the defendants was thereupon applied for them by their attorneys, and perforce was granted. The other two, McIntosh and La Fante, ignoring a spate of weekend publicity—none of it unduly flattering to the defendants—wanted no mistrial and insisted on having their cause submitted to the jury. By not taking the stand in that trial they had been shielded from exposure to questioning as to the unhelpful matters thus publicized, and other data which could never have been a proper matter for jury consideration. A second time a jury trying them disagreed.

The fourth trial was presided over by the writer. All five defendants were on hand for its commencement on 1/6/64 and also at its close [3864] three and a half months later when on 4/25 the jury after no lengthy deliberation reported its verdict of guilt as charged.

In the fourth trial some thirteen thousand pages of testimony and colloquy, most of the latter with the jury excluded, were recorded. Mr. Lefkowitz who appears here for Mr. Schipani represented Albanese, one of Persico's co-defendants, upon that trial. The experience must have been a harrowing one for him, as he was not only unpaid assigned counsel (by Mishler, J.) caught in the nightmare of an anticipated two weeks engagement that dragged on instead for months, but also by reason of his falling ill of an excruciatingly painful and embarrassing ailment, despite all of which he carried on courageously. His current representation is, more profitably and deservedly, as retained counsel.

The testimony of Vaccaro alone, the opening witness in the fourth trial, consumed nineteen court days and comprises, with its interminable colloquy of court and counsel, over four thousand pages of minutes. It was at the conclusion of Vaccaro's direct examination that an in camera proceeding, which served as an exemplar for the one here criticized, was conducted. The procedure was disclosed and apparent to all defense counsel, including Mr. Lefkowitz, before it took place. It was fully reported by the clerk and court reporter who were in obvious attendance following prior announcement in open court to such effect.

[3865] The Persico record comprises approximately 10,000 pages of transcript of the trial proper plus perhaps an additional 3,000 pages of untranscribed minutes of extended argument at the outset in relation to applications by defense for a continuance by reason of "prejudicial publicity," for severance, etc. and voir dire upon the selection

of the jury. Innumerable motions for a mistrial were made by defense counsel, and thousands of objections interposed by them to rulings made by the court, actual or merely feared. Not once, however, was an objection noted or motion for mistrial made by any defense attorney with respect to the § 3500 procedure which the court adopted and which in a similar context Mr. Lefkowitz now cites as justifying a mistrial.

Upon the Persico appeal, four attorneys represented the five defendants. Mr. Lefkowitz had upon his request been relieved from his assignment as attorney for the indigent Albanese, and Mrs. Wolff, assigned counsel for the defendant Spero, had graciously agreed to represent the defendant Albanese as well as her original client. In such appeal only Mrs. Wolff so much as mentioned the subject of the § 3500 procedure in her appellant's brief. The thrust of her position was that the defendant Spero had been prejudiced by the court's "clandestine meetings" with government counsel, but she indicated quite clearly by her transcript references that what she was animadverting upon were certain conferences [3866] between the court and the U. S. Attorney relating to jury security in the trial and not the § 3500 procedure. These were announced in open court, but from them the defendants and their lawyers were, understandably in light of what follows, excluded. For early in the trial, before the jury had been selected, the prosecution had vigorously charged upon the record that the juries which had disagreed in the first and third trials had been tampered with, and that efforts were on foot to fix the fourth jury as well. The assassination of Vaccaro, it was alleged, was also being plotted.

Defense counsels' unwillingness to include as basis for their innumerable objections and motions for mistrial in Persico the court's § 3500 in camera procedures was sensibly motivated, as it is in the current case. For as soon as Vaccaro had concluded his direct examination the prosecutor proceeded to have marked for identification and to turn over to the defendants' attorneys *all* the 3500 material, but no more than that, which they had received at the same juncture during each of the first three trials. The three judges who had severally presided at such trials and the Court of Appeals in its review of the judgment of conviction upon the second trial had presumably found the delivery in the respective trials an adequate compliance with the requirements of the Jencks Act. An inviting prospect, however, now upon the fourth trial lay open to the attorneys to get more—much more. The only [3867] condition which confronted them was to persuade the court that no one would be murdered in consequence of what was additionally to be disclosed, and to enable the court to satisfy itself that it was not, by reason of its unfamiliarity with the details of the far-ranging highjacking investigation other than the one for which they were being tried, compelling the government to disclose what it was in the public interest to withhold.

The reversal of the conviction on the fourth trial was, as the opinion declared, solely for errors committed by the court in an overlong charge. The majority opinion of the Court of Appeals[A 3] was express in its view that as to the "numerous points raised on the appeal" other than those thus noted as error "neither individually nor in their totality do they constitute grounds for reversal."

The disposition of Mrs. Wolff's point which touched the in camera proceedings was couched in the following language:

> "Defendants make complaint about the in camera proceedings conducted by the trial judge in connection with rulings on Jencks Act material (18 U.S.C. § 3500). The Assistant United States Attorney was present, but not defense counsel. A verbatim transcript of these proceedings was made and sealed along with certain material which was not furnished defense counsel. The court has read these transcripts and finds that absolutely nothing untoward occurred insofar as the fair trial of this case was concerned. However, the procedure followed was entirely unnecessary and violated Canon 17 of the Canons of Judicial Ethics. We do not consider this a ground for reversal, but it is adverted to solely to assure that such procedure is not followed in the future. In the absence of some extraordinary circumstance all proceedings affecting the trial should be conducted in the presence of counsel for both sides."

[3868] How this brief paragraph is to be construed in its relation to the current problem can be made clear only by further use of the Persico context as a frame of reference. Had the Persico teaching been available in time for the guidance of the court in the instant trial, it would have been obedient to the injunction admonishing against repetition. The consequence surely would have been the withholding of far more than the miniscule fraction of Exhibit 287 which was excised as not relevant on its face to the Masetti direct examination. (See infra, pp. 77-79 for discussion and explanation.)

Appendix B—Opinion by Rosling, U.S.D.J.

The Persico appeal Jencks Act stricture upon this court's procedure breaks down into the following elements:

(1) A verbatim transcript of the proceedings was sealed by the court together with the excised matter and made available for appellate review.

(2) "Absolutely nothing untoward occurred" in the absence of defendant and his counsel "insofar as the fair trial of this case was concerned."

(3) The procedure was "entirely unnecessary."

(4) The procedure violated Canon 17 of the Canons of Judicial Ethics. The canon, not quoted in the text of the opinion, reads:

> "A judge should not permit private interviews, arguments or communications designed to influence his judicial action, where interests to be affected thereby are not represented before [3869] him, except in cases where provision is made by law for ex parte application.
>
> "While the conditions under which briefs of argument are to be received are largely matters of local rule or practice, he should not permit the contents of such briefs presented to him to be concealed from opposing counsel. Ordinarily all communications of counsel to the judge intended or calculated to influence action should be made known to opposing counsel."

(5) The Court of Appeals did "not consider *this* a ground for reversal."

(6) The trial court to which the case was remanded for a fifth trial was admonished not to follow the ex parte practice in the future.

(7) In the absence of some "*extraordinary circumstance* all proceedings affecting the trial should be conducted in the presence of counsel for both sides."

(Underscoring supplied in items "5" and "7" for more convenient reference.)

The word "this" in section 5 leaves the court in doubt as to the precise referent. It is unclear whether what the opinion teaches is that only a canon of ethics as distinguished from organic law was infringed and hence reversible error was not committed, or whether the finding that the trial was in any event fair was the controlling consideration.

The warning in Persico against repetition of action notwithstanding no ground for reversal was found therein presents an additional difficulty for this court in evaluating the current defendant's belated objection and motion for a [3870] mistrial, for the Persico text suggests that an "extraordinary circumstance" might despite the canon cited authorize the questioned procedure.

Appendix B—Opinion by Rosling, U.S.D.J.

"Extraordinary procedures" considered. Publicity, Jury Fixing, Murder and Mayhem, Gang Wars, and a Sweeping On-Going Investigation by the FBI of Numerous Highjackings as the Frame of Reference in Persico for the Courts § 3500 In Camera Procedure.

None of the matters, for which the headnote of this division is not excessive, appear to have been discussed in the briefs submitted by the parties to the Court of Appeals in Persico IV. And yet they constituted, the jury being absent, the subject of days and days of argument and colloquy with numerous supporting exhibits[A 4] presented to this court during the period between January 6, 1964, when the trial began and January 20, the first trial date noted in the transcribed portion of the record. Continuing freshets of motion and argument, with additional exhibits, flooded the proliferating record as the points thus preliminarily urged were labored and renewed with unimaginable persistence of counsel. To undertake more than the most cursory reference to this essentially tangential factual background in a prior prosecution so that its bearing on a claim of prejudice asserted by an attorney who appeared as counsel in both the earlier and the current suits may be assessed would serve no useful purpose in an opinion already much too lengthy. The following, however, [3871] may be useful in such evaluation.

As the first order of business upon the Persico IV trial, four of the five counsel for defendants moved for a lengthy continuance, advancing in justification the claim that their

principals, chiefly Persico, had but recently been the target of extensive newspaper, magazine and other publicity, none of it laudatory. From the mountainous conglomeration of exhibits offered, we cull the following titles as typical of all:

"Revolt in the Mafia," a book copyrighted 1963 with frequent references, passim, in context to Persico. The author as we are advised on the dustcover was one "Raymond V. Martin, Assistant Chief Inspector (Retired) in charge of Brooklyn South Detectives." "Brooklyn South" is the locale of the events examined into in the Persico trials.

Life (Magazine) issue 8/30/63, Article entitled "Mafia Rubs Out a Rebellion," with accompanying photographs of the dead and half dead, vividly bloodied and ecchymosed. Among these are, each in a separate frame, two of the defendants, the one subtitled "Joe Magnasco, (Dead)" and the other "Carmine Persico, (Wounded)."

Saturday Evening Post, Issue of 8/24-8/31/63, Article entitled "My Life Inside the Mob," by Sidney Slater with Quentin Reynolds. Impressive photographs accompany the text, but none are those of any of the defendants. Persico, [3872] however, is mentioned in the account, and not with intent to commend him.

New York Post, newspaper published 9/19/63, a full page article entitled, "The Loan Shark Racket." Only one photograph illustrates the tract. It is Persico whose three quarter full face stares cold-eyed from the central column of print, half of which it occupies. For easier identification a subscript legend is provided. It reads: "Carmine (Snake) Persico—His gang worked as triggermen."

Appendix B—Opinion by Rosling, U.S.D.J.

Sundry references in the New York Times, New York Herald Tribune, the New York Daily News, and Newsday, a daily serving Long Island, fill out the budget of the feature writers to whom the libel laws do not seem to give pause. The undersigned, presiding at the trial, might not avert his gaze. Compelled by the act of defendants' attorneys he read what was submitted that he might be able to rule upon their application. Thus the court received a dossier in advance of, and de hors, the trial testimony which no amount of hugger mugger confabulation with the prosecution could have further denigrated. The court denied the continuance —six months—applied for. The life expectancy, it explained of persons interested was too uncertain.

The prosecution immediately countered with a motion of its own to remand three of the defendants—two were already serving prison terms and were in attendance only pursuant to writs—and to sequester the jury for the duration of the trial. The [3873] basis for the application was alleged jury fixing during the first and third trials in which the juries had disagreed, a pending scheme to fix the fourth jury as well, and a word picture of menacing gestures directed in open court during the third trial toward the jury by putative cohorts of the defendants, with the inference strongly suggested of renewed visits in the present trial by others with similar objective in view.[A 5] Additionally, plans for the assassination of the witness Vaccaro were charged.

The court, on applications to sequester and remand has, it is well known, a wide discretion, and may act on less of a showing than would be required for prosecution and conviction of relevant offenses.[A 6] To accommodate the require-

ments on the one hand of fair play to the defendants with exigencies of trial security[A 7] on the other the court directed government counsel to draft a general affidavit embodying his assertions and supplying as much particularization as he might safely venture without "tipping" the FBI's hand, and to serve copies of the affidavit upon defendants' attorneys. To the court he was to deliver a document which, detailing source and substance of his accusation, contained the key to what was charged and which would after in camera review be retained by the court as though it were—which it of course was not—excised § 3500 matter reserved only for the eyes of a reviewing court

The defendants might at their election reply to the general affidavit by argument and answering affidavit. [3874] Despite what the prosecution had thus disclosed to them, they would be handicapped in their opposition by their ignorance of what had been withheld.

Nor if their clients were remanded, as they ultimately were, would defense counsel be denied an opportunity to renew their applications that their clients be enlarged.

That the procedure in its analog to a Jenck's Act routine was in no minor sense ex parte could not be gainsaid, but that the court's choice was one responsive to the duress of circumstances is at once apparent upon a reading of the papers which the government served upon defendants in context with those submitted ex parte and only to the court. In what follows the seal of secrecy is broken as to some, but not as to all, that was thus kept private. Nor is more of the general affidavit summarized than suffices to impart

its flavor. The confidential matter now for the first time revealed is underscored in what follows.

The jury at the first trial had reported its disagreement on 5/13/61. The second trial (before Judge Abruzzo) began the 5th of the following month of June. In the interval between the end of the first and the beginning of the second of the trials an informer had told a story of tampering with the jury at the first trial. His information was prime, *for the informer was one of the defendants on trial. And his information was conveyed through no intermediary. He told it* [3875] *directly to a United States Attorney and agents of the F.B.I.* Following this lead, and thereby verifying its basic reliability, the Federal Agents interviewed, among others, a juror who had been approached and an underworld character who had approached him. Both separately admitted they had been in contact. A request had been made by the interloper of the juror that he should help a named defendant. Significantly the incident had not been reported to the trial judge by the juror thus importuned.

With respect to the third trial it will be recalled (see supra, p. 61) that adverse publicity had flooded the papers over the weekend following the shooting of Persico. Two of the defendants, La Fante and McIntosh nevertheless would not join in the application of the other three for a mistrial which was, accordingly, granted to these three only. The event—a second disagreement of the jury—justified the confidence defendants La Fante and McIntosh had manifested. Their conduct, otherwise inexplicable, is readily understandable if the allegations of the government's general affidavit, read with the key supplied by the

court's "private" memorandum, are accepted at face. For the purposes of the motion to remand the court felt constrained to give what was thus averred at least prima facie credit. The general affidavit which had been delivered to the prosecution recited the following:

[3876]

> "* * * At the conclusion of the trial ten members of the jury visited the office of the United States Attorney for the Eastern District of New York and informed the United States Attorney's office that the jury's deliberations had ended 10 to 2 for conviction of both defendants; that at one point of the deliberations they had agreed on a guilty verdict against the defendant Hugh McIntosh but when that agreement was put to a vote the count was 11 to 1, one juror having reneged on the agreement. All jurors reported that the one dissenting juror, at the moment deliberations began, went over to a bench, reclined on it and said 'Wake me up when you decide that the defendants are not guilty.' He would not listen, nor did he change his position during the two days of deliberation.
>
> "Judge Bruchhausen read the so-called Allen Charge on two occasions to no avail. A confidential informant, whose name will be revealed to the Court, and who is in a unique position to know, informed agents of the Federal Bureau of Investigation that efforts to approach the jury by the defendants were successful and that was why McIntosh elected to continue on to the conclusion of the trial.
>
> "Another confidential informant, also in a unique position to know, informed agents of the Federal Bureau of Investigation, as well as your deponent, that there had been tampering with the jurors in the

third trial. Members of the New York City Police Department have told your deponent that the so called Gallo Group had a representative in the courtroom during the course of the entire trial and that, having learned through underworld sources that the jury had been tampered with, decided to take justice in their own hands and murder the defendant Carmine Persico, Jr. This was one of the reasons which prompted the shooting of the defendant Persico on the day before summations. It should be noted that in spite of the widespread publicity naturally prejudicial to the defendant Hugh McIntosh, he chose to continue with the trial.

"During the jury's deliberations known members of the underworld, some of whom have since been killed, attended the trial, menacing the jury [3877] and causing great concern to your deponent, who was then prosecuting the case and occasioned your deponent to order Marshals in among the group. An additional purpose for the presence of this menacing group was to safely escort McIntosh, Persico's first lieutenant, to and from the courthouse to protect him from the same fate as Persico. It was in this atmosphere and attitude that the jury had to perform its important functions. After the trial jurors reported that they were aware of the presence of these men and understood the nature of their menacing attitudes."

The court now for the first time reveals that the in camera affidavit gives the names of at least one of the informants as to the third trial jury tampering, whom it describes *as a close associate of the defendant La Fante.* A secondary source of dovetailing information was reported to be *"officials of the New York City Police Department*

who because of security reasons refused to divulge to the (U. S. Attorney) the name of their informer." La Fante is alleged to have declared to his associate that the third jury had been successfully "reached" and that "Hugh McIntosh is currently charged with the duty of trying to 'get close to' a juror on this (the fourth) panel but that so far he has not been successful."

Annexed to the general affidavit moreover, was a melancholy three page "Boot Hill" schedule, a catalogue of numerous deaths coupled with references to injury by violence and suspicious disappearances, all of persons who allegedly moved in circles to which the defendants were not strangers. [3878] This, too, furnished the court with much food for thought as it weighed the pros and cons of the remand and sequestering applied for and opposed, and later when it came to consider the mass of § 3500 material that the government had not on any of the earlier three trials opened up to the defense.

§ 3500 AS AN INQUIRY, NOT AN ADVERSARY PROCEEDING, INVOLVES PROCEDURAL, NOT CONSTITUTIONAL PROBLEMS.

Thus, in an aura of menace and sudden doom which might —for none could in advance make prediction or, to the contrary, give safe assurance—befall one whose name chanced to receive even passing mention in the mass of papers which comprised the government's Vaccaro file in this and other pending investigations—(one might thereby be marked in a fearful mind as a potential informer or enemy)—the court was called upon when Vaccaro's direct testimony ended, to

make the determination as to what should be disclosed and what withheld.

In the present trial the difficulty in a sense was even greater than that which confronted the court in Persico IV. The physical danger to be apprehended may have been nonexistent. The presumption of innocence compels such conclusion. But what is set out in the Masetti § 3500 material suggests a continuing and far ranging investigation not limited to the defendant here charged. The affairs of others [3879] than Schipani adumbrated a shadowy, intermediate area wherein may be found that which the government asserts it has a right to conceal as matters whose trifling relevancy to what is here under inquiry is far outweighed by the public interest in maintaining their confidentiality inviolate. Fair play to a defendant blindly groping toward that which is denied him might on the other hand require disclosure whatever the cost to the sovereign. It was in such central area of uncertainty that the trial court was called upon to give play to its discretion.[A 8]

In the present case Agent Masetti had given his expert opinion as to what was required, and what had been done in compliance with that requirement, in carrying through a thorough investigation of defendant's financial affairs by the government. Only by demonstration to the court's satisfaction that it had made such investigation could the prosecution provide a basis which the court would accept for the net worth and income computations. (See supra, pp. 4, 16-18). Such testimony had in the court's view thrown the Jencks Act door wide open for explanation of the documentation upon which the expert witness had come to the conclusions he had announced and proffered as valid.

Mr. Ruby had originally in camera noted his objection to turning over by far the greater part of the matter comprising Exhibit 287. In the end, however, after an overnight review of the document at home by the court, the U. S. Attorney with [3880] some misgivings upon resumption of the in camera proceeding, was persuaded to consent to delivery of almost the entire exhibit. Extensive supplemental source material merely identified in Exhibit 287, but which had not as yet been made available to the court by such attorney and presumably constituting the product of a vast investigation extending over a long period of time seemed to involve the affairs and possible derelictions of others, alone or in association with the defendant. All this, the court announced in camera in the absence of protest from Mr. Ruby and thereafter repeated in open court, was to be the subject of further § 3500 inquiry. Disposition of the question of a later in camera examination of these identified supplemental documents was to be reserved until after Mr. Lefkowitz had had his opportunity to inquire concerning them and the court could reflect upon the matter. It developed that the defense attorney after having had Exhibit 287 for study over the weekend [Tr. 3285-3287] was not interested in questioning Mr. Masetti or Mr. Ruby as to these as yet unproduced documents [Tr. 3290, 3308, 3309-3436]. He did not ask about them nor demand their production.

In the in camera proceeding, moreover, the sealed record will indicate that Mr. Ruby had originally objected to the delivery to the defense of pages 64 through 146 (page 86 excepted), and many other pages, wholly or in part.

Among the items originally opposed but which by the [3881] court's persuasion and direction were made public was a list of *551* numbered exhibits, with contents undisclosed, and of *170* potential witnesses with only their names and addresses in most instances provided. A small-proportion of these did in fact testify. The testimony of others was dispensed with the court's receiving Mr. Lefkowitz's stipulation in lieu of testimony as the proof. To the defendant the sterile lists of names might gives clues concerning the government's prying into affairs which, as unrelated to this trial, were no concern of his. These clues might prove useful knowledge for him in the concerns of others and perhaps even his own. For the court, however, uncued by any prior familiarity with the subject matter, these lists provided only an interminable index to the unknown except in those relatively few instances in which in the court's less than perfect recollection of the testimony, later to be refreshed by the transcript, something appeared which might be correlated with proof directly adduced at the trial.

DANGERS OF INQUIRY IN OPEN COURT INTO THE MEANING OF THE ITEMS LISTED, UPON A § 3500 EVALUATION.

A number of references in Exhibit 287, which in the end were not ordered turned over to defense, alerted the court to the danger of indiscriminate and open court inquiry, directed to the prosecution with the defendant listening, as to possible relationship between the items enumerated and the Masetti testimony. And yet unless there was such inquiry how was the court to avoid giving no more than mere

lip service to the teachings of [3882] those most recent cases that even that which might be useful only in the impeachment for bias and interest of the witness, with defense counsel as the judge of value, should be given over? How was one fairly to comply with the rule of United States v. Birnbaum, 337 F. 2d 490, 497 (2d Cir. 1964), and of Borelli, supra, and of Rosenberg v. United States, 360 U.S. 367, and Palermo v. United States, 360 U.S. 343 in support, that production may be required through the Jencks Act witness did not on his direct examination testify as to the contents of the specific document or conversation the interview report of which was now demanded? And what of United States v. Ellenbogen, 341 F. 2d 893 (2d Cir. 1964) that "prior statements that relate 'generally to the events and activities testified to' must be produced?"

The appellate courts in this troubled field are unanimous at least in the view that the cross-examiner knows best, and surely better than the judge, where to plant his spade, and the trial judge must direct the prosecution, once a 3500 relationship defined by decisional law has been established with the testimony of a witness, to transmit the document to the defense. But what short of clairvoyance can, where the document gives no clue, inform the judge that a seemingly neutral writing is thus related and hence producible, or that an apparently innocuous one is both irrelevant under the section and calamitous even to hint at. When the court with a trial scarcely begun, [3883] in the dark as to what is to follow and uninstructed as to much that will never become part of the record, is called upon to make its determination as to what is to be withheld and what given up to the defense

it has no such conspectus of the whole as is possessed by the attorneys for the parties or is afforded to a reviewing court by the record of a complete trial and summations which draw the threads together. In the ordinary cases, and these predominate, the § 3500 demand by the defense presents no problem for the court. Customarily the statements are turned over directly by the prosecution to the defense without recourse to the court for in camera adjudications. But when what is in question is an unmarked island in an uncharted sea of a general rackets investigation the answer is not easy to come by. Solitary perusal of a meaningless jumble of words makes them no clearer. Mere coded reference numbers noting, as here, the existence of otherwise unexplicated documents, aid the court even less. What is obscure, continues so, and open inquiry is dangerous.

Nor would Mr. Lefkowitz's attendance in chambers *without* his client, a solution he proposes for the court's dilemma, have furnished the answer. The attorney's presence would have been not in his own right, but vicarious in his client's interest with a duty to disclose what he had learned. (See Canon 15 of the Canons of Professional Ethics) And why would he be there? His function surely would not have been to [3884] make certain that an unwatched prosecutor did not instill a poisonous potion in a receptive judicial ear. If that were the government's desire the contents of Exhibit 287, though no hostile prosecutor were present, could well supply all the venom which the prosecutor would have needed to prejudice the defendant.

Appendix B—Opinion by Rosling, U.S.D.J.

Here the client's waiver of a jury trial had breached the dam that might otherwise have insulated the trier of the facts from exposure to extraneous blackening of the good name defendant was entitled to for the purposes of the trial. Nor does it serve defendant as a valid argument that in the end the government conceded all that had given the unknowing court concern. The court could not at the threshold of its inquiry have anticipated such an outcome.

Realistically, by what ingenious contrivance, by the use of what Aesopian verbiage could a public inquiry go forward in such fashion that no clue as to what was being withheld might accrue to defense counsel or his client from what their eyes beheld and ears heard, what cryptic phrasing of the court's inquiry and U. S. Attorney's response could successfully mask the content of their colloquy? How were the nature and content of what the prosecutor asked the court to excise and which he was in fact entitled to have kept inviolate from disclosure to the defense, to be preserved in secrecy? Would any esoteric semantics which the court and prosecutor might engage in under the watchful eye and attentive ear of the defense, at the same instant enlighten a court which was without an initial and underlying familiarity with the matters explored, and yet keep in [3885] continuing ignorance one whose very fabric and texture of existence was being penetrated by the inquisition?

§ 3500 Procedure, a non-adversary Inquiry, not a Trial, Involves a due Accommodation of ex parte and open Court Judicial Action.

Between Jencks v. United States, 353 U.S. 657, 77 S. Ct. 1007 (1957) and United States v. Burr, 25 Fed. Cas. p. 187 (case No. 14,694)[A 9] a sesquicentennium had elapsed. And yet Jencks marked the passage of the century and a half by undertaking once more and still with less than complete success[A 10] to shift the ever wavering line that divided the area wherein were to be found those writings which must be produced in aid of an accused on trial from that in which lie buried from public view those documents which by reason of the public interest should be withheld from a defendant and his counsel. In passing Jencks gave a curt nod of recognition to Burr (see Jencks, ffn. 12 and 14).

Jencks had been argued in October 1956 and was decided in June of the following year. Roviaro v. United States, cited supra, which had been argued later (December 1956) but decided earlier in March 1957, reaffirmed the competing right of the government in the judicial process to "balanc[e] the public interest in protecting the flow of information against the individual's right to prepare his defense."

[3886]

Jencks does not appear to have overruled Roviaro at the time so recently decided. Jencks, however, was explicit in its declaration, U.S. p. 669, S. Ct. p. 1014, that "[t]he practice of producing government documents to the trial judge for his determination of relevancy and materiality, without

hearing the accused is disapproved," citing cases illustrating such earlier procedure. [emphasis supplied]

Jencks further noted, ibid., with a clear expression of approval "the holdings of the Court of Appeals for the Second Circuit (citing additional cases) that in criminal causes * * * the government can invoke its evidentiary privileges only at the price of letting the defendant go free." "We hold," the court's opinion expounded (U.S. 672, S. Ct. 1015), "that the criminal action must be dismissed when the government, on the ground of privilege, elects not to comply with an order to produce for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony." As being in accord with this draconian pronouncement the Supreme Court cited Roviaro, and then concluded with a declaration which surely rang sweetly in the ears of the harassed district court judiciary:

"The burden is the Government's," the court declared, "not to be shifted to the trial judge, to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of [3887] state secrets and other confidential information in the Government's possession."

In short, the boundary of the precinct wherein ex parte action was authorized and might be resorted to, enclosed the prosecution but excluded the judge. The U. S. Attorney was cautioned, however, that "the interest of the United States in a criminal prosecution '* * * is not that it shall win a case, but that justice shall be done * * *' Berger v.

United States, 295 U.S. 78, 88, 55 S. Ct. 629, 633," and admonished (Jencks fn. 13) that Canon 5, American Bar Association, Canons of Professional Ethics (1947) established a high standard for a prosecutor's conduct. The canon in pertinent part announces: " • • • The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. He should avoid oppression and injustice of any kind whatsoever. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is a public wrong."

Jencks expressly required that delivery of eligible documents be from the hand of the prosecution into the hand of the accused without intermediate review by the court. "Only after inspection of the reports by the accused, must the trial judge determine admissibility—e.g. evidentiary questions of inconsistency, materiality and relevancy—of the contents and the method to be employed for the elimination of parts immaterial or irrelevant."

[3888]

Under the Jencks case it is clear that none of the court's proceedings were permissibly ex parte, whereas until material was produced to the defendant, and except as to the material thus uncovered, all the prosecutor's sifting and winnowing of material were ex parte. He was on his honor to be fair. For the U. S. Attorney, as we now view his duty retrospectively against the perspective of the Jencks Act which was soon thereafter to be enacted to repair the damage done by the case which gave the statute its name, the high court had given him a well-nigh impossible counsel of perfection.[A 11]

It is inconceivable that a prosecutor, however conscientious and well disposed, could be so far "above the battle" that he could fairly determine which marginal documents fell within the modern rule noted supra, pp. 79, 80, requiring their surrender. In this connection we find as far back as 1807 the Chief Justice in Burr already noting that "As to the use of the letter, it is impossible that either the court or the attorney can know in what manner it is intended to be used."

And a century and a half later the opinion in Jencks revisits the thesis with the observation that "[b]ecause only the defense is adequately equipped to determine the effective use for (sic) purpose of discreting the government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less."

[3889] The trial judge now finds himself under the Act required to complement the ex parte procedure of the U. S. Attorney in preliminarily examining his files, with his own ex parte examination of the documents which the government produces to the court with a request that they be processed and withheld. The Jencks Act supersedes the Jencks case in giving the broad outlines of evidentiary procedure to be followed. Illustrative are Rosenberg, supra, and Palermo, supra. But the broad directives of the Act and the implementing details which the trial courts must supply in constantly shifting situations on an ad hoc basis present disparate problems. The infinite variety of ordinary human experience becomes no simpler when crime is

the helmsman. Multiplex though the problems may be as they manifest themselves, they must be dealt with.

When what is conducted ex parte by prosecutor and the court is integrated with what is carried forward in open court the defendant's rights continue to be hampered and circumscribed in his efforts to lift the veil from that which has been denied him. He is not concerned with conflicting public interest. Manifestly, he requires no interrogation touching the production of that which the prosecution yields without exception. Yet, however liberally disposed the court, though the § 3500 hearing be open and plenary, the court may not permit defense counsel by a pregnant and searching inquisition to gain even an inkling of that which the prosecution is ultimately found to be [3890] entitled to have wholly withheld. In this interplay of the ex parte and the plenary, with what is hybrid occupying the dubious and tentative middle ground, questions of constitutional dimension are fortunately not confronted in the foreground in a determination of a court's competence to fashion procedures which are fair. True, at a certain point the procedures availed of by the court may be so extreme that they impinge upon the due process that may not be denied a defendant when he faces the sovereign as his accuser. But if the procedures which the Jencks case had announced as disapproved were structured under the constitution they could not have been restored, as they were, by the act and then upheld by the Supreme Court when they came to be reviewed.

Palermo, supra, makes clear that in Jencks the Supreme Court had done no more than exercise its "power, in the absence of statutory provision, to prescribe procedures for

the administration of justice in the Federal Courts." In its fn. 11, Palermo explains, "The statute as interpreted does not reach any constitutional barrier. Congress has the power to prescribe rules of procedure for the federal courts, and has from the earliest days exercised that power. See 37 Harv. L. Rev., at 1086 and 1093-1094, for a collection of such legislation. The power of this court to prescribe rules of procedure and evidence for the federal courts exists only in the absence of a relevant Act of Congress." (citing cases). Cf. United States v. Persico IV (supra) in which the Court of Appeals while criticizing the procedure followed by the trial judge as wholly unnecessary [3891] and violative of the Canons of Judicial Ethics, nevertheless was able to find that in this regard the trial was "completely fair" and no ground for reversal inhered therein. Error of constitutional dimension is not thus off-handedly to be waved aside.

In Campbell v. United States, 365 U.S. 85, 97, 81 S. Ct. 421, 427 (1961) the court held that an inquiry under § 3500 "conducted by the judge was not an adversary proceeding in the nature of a trial controlled by rules governing the allocation between the parties of the burdens of proof or persuasion. The inquiry was simply a proceeding necessary to aid the judge to discharge the responsibility laid upon him to enforce the statute * * *. The statute says nothing of burdens of producing evidence. Rather it implies the duty in the trial judge affirmatively to administer the statute in such way as can best secure relevant and available evidence necessary to decide between the directly opposed interests protected by the statute—the interest of the government in safeguarding government papers from disclosure,

and the interest of the accused in having the government produce 'statements' which the statute requires to be produced."

It should now be clear that there is no sharp bifurcation of Jencks Act procedure, with the ex parte in camera wholly on one side of the line and on the other a plenary inquisition, in which the defendant participates with the jury [3892] absent. Rather there is a gray area in between where the ex parte by cautious gradations merges into the fully public. The court does less than its duty if, staring hopelessly at an unwieldy and largely unintelligible mass of papers, it makes mere pretense of compliance with the humane directives of the Jencks Act, withholding all from the defendant which does not by verbal nexus show some immediate, and perhaps superficial, relevancy to what the witness concerned has testified to on the direct examination which has just ended. Should the court, halting the trial for the days or weeks compliance would entail, ask the prosecutor to submit a memorandum, necessarily ex parte, and possibly even more voluminous than the papers already before the court, for study, which will supply names and contexts and chart the true relationships to demonstrate the absence of a "relationship" the Jencks Act stipulates as a prerequisite to enforced delivery to the accused? What if the defendant is further blackened by such supplemental documentation submitted for the court's "enlightenment"? The defendant would have no means of knowing he had been thus injured. As to the original material, however prejudicial, the defendant may not complain, for the U. S. Attorney is under the strongest mandate to submit everything that may in any

sense be pertinent. It is only the court that may make the determination to deliver or to retain.

If the U. S. Attorney were asked to supply his [3893] explanation in open court, the public nature of the hearing would not detract from the indisputable fact that the proceeding continues ex parte though defendant and his attorney are present. For they are excluded from a full participation, through lack of knowledge, in the proceedings. Court and Prosecutor openly engage in colloquy, but if the colloquy achieves its intended and authorized effect, nothing is disclosed unless and until a direction of the court unseals it. Absent such direction, the prosecution's right to keep secret justifies court proceedings in Sanskrit, assuming the defense is not literate in that tongue.

Cf. United States v. Reynolds, 345 U.S. 1, 73 S. Ct. 528, 1952, a civil suit wherein, however, language is used which is apposite to the problem here under discussion. "The court itself" the Reynold's opinion reads "must determine whether the circumstances are appropriate for the claim of privilege [by a government agency], and yet do so without forcing a disclosure of the very thing the privilege is designed to protect. * * * The privilege against self-incrimination presented the courts with a similar sort of problem. Too much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect, while a complete abandonment of judicial control would lead to intolerable abuses."

The defendant's attorney in his client's presence in [3894] open court twice expressly assented to the § 3500 procedure followed by the court. An enormous saving in

time of court and counsel was thereby effected. It should be clear from the fact that a record was made with court clerk and reporter present, and from the content of the record, that defendant, far from being prejudiced, was vastly benefited by the direction of the court which resulted in the government's turning over almost the entire Exhibit 287. The proceeding may have been ex parte. It could scarcely be challenged as clandestine.

Objection was first interposed, presumably "to protect the record", *after* defendant had received the document and examined it over a weekend. But the absence of objection by all defense counsel in Persico and the failure of all but one to even note it as claimed error in their briefs on appeal, did not avert the stricture that the court had violated a canon of judicial ethics. As earlier noted Persico was decided too late for the court to benefit in Schipani by its teaching. Retrospective compliance being impossible, the foregoing excursus and apologia appeared appropriate.[A 12]

[3895]

FOOTNOTES TO APPENDIX

[A 1] The approval by the defense of the court's procedure is more evident from verbatim quotation than through paraphrase, but because of its length further reproduction of the transcript is relegated to this footnote. The record continues pp. 3201-3204 [in open court addressing the defense]:

"The Court: The Court has examined the grand jury minutes and has consulted with the United States Attorney. Partly by rulings and partly by consent, the entire transcript will be made available to you, Mr. Lefkowitz.

The hour is ten after four and I have a 4:15 appointment in Chambers with a public official on official business, so I will not have time tonight to review the 3500 material, at least to make ruling on it. I will, however, *discuss the problem briefly with Mr. Ruby in Chambers* to find out generally what it is that he is opposed to turning over, that is, what type of matter he is opposed to turning over, and I will take the papers home with me and if I have insomnia tonight—which is not too uncommon with me—I will read at two, three, four in the morning, as the mood hits me, and I will be ready for you tomorrow.

So that *tomorrow's session in camera* will thereby be materially shortened, and we can figure to start about 10:30 tomorrow.

Mr. Lefkowitz: Your Honor, I was going to ask the Court to start a little later tomorrow morning. I do have to see the doctor in the morning.

I would ask the Court if we could start at quarter after eleven.

The Court: Possibly we will do it this way. You get here as soon as you can. I will be available. You will have Mr. Masetti available. We will have no morning session if you require the balance of the morning to review the 3500 material.

You are going to have a substantial part [3896] of it by consent immediately. Through Mr. Ruby's statement you may have it all after we have reviewed it, or possibly more than he is prepared to give you immediately.

If upon second thought you decide to go ahead with your cross-examination, you will not require immediately the review.

Then you will be permitted to proceed and we will discuss in the course of the examination whether you want to carry through to completion or whether you want the examination

interrupted to review the 3500 material. In other words, we will follow a flexible procedure.

Immediately you will get the grand jury minutes, a copy of the grand jury minutes. You won't have the original turned over. Those are official records, and for that you may have to accompany Mr. Ruby to the Federal Attorney's Office or make whatever arrangements you gentlemen make between you, and we have the document marked as an exhibit tomorrow. It will be deemed for the moment as Government's Exhibit 288 for Identification.

Incidentally, the Court has very little—not more than three pages which were involved in the objections—parts of three pages—so that if there was any material in the rest of it, you still have the benefit of a—what you would have if there were a jury here, namely, a Court that doesn't know what was testified to even by this witness before the grand jury.

Tomorrow, when you come from the doctor's office, you will advise the Court, and we will determine, based on what procedure you desire in that regard, whether we will proceed at once with the cross-examination of the witness or whether—and the statute provides for this—you are to have a reasonable opportunity to review the 3500 material, or some modification—or we will adopt some modification of that procedure. *Is that satisfactory?*

Mr. Lefkowitz: *Very good.* Thank you, your Honor.

[3897]

(Whereupon, at 4:15 o'clock p.m., an adjournment was taken until Friday morning, February 26, 1965.)"

[A 2] For authority recommending such procedure as preferred see Campbell v. United States, 365 U.S. 85, 96, 81 S. Ct. 421, 427 (1961).

[A 3] Judge Marshall wrote merely, "I concur in the result." No language in the majority opinion can, accordingly, with assurance claim the concurrence of the entire bench.

[A 4] These continue gathering symbolic dust, as they have been from their original marking as exhibits in Persico IV, in the writer's chambers. They have been called for by none of the attorneys since they were originally introduced into evidence.

[A 5] Vaccaro had testified at a later point in the fourth trial in the absence of the jury as to a similar incident which had occurred while the jury was present and he was on the stand. The occurrence received partial substantiation from a marshal. In his case the intimidation was a drawing of the hand around the throat. The culprit was a relative of a defendant who unobserved and contrary to the court's general direction had seated himself in an area forbidden by the court to the trial buffs as too directly in line with the witness on the stand.

[A 6] See Fernandez v. United States, 81 S. Ct. 642 (1961); Carbo v. United States, 82 S. Ct. 662, review denied 369 U.S. 868, 82 S. Ct. 1137 (1962); United States v. Di Pietro, 302 F. 2d 612 (2d Cir. 1962); United States v. Bentvena, 288 F. 2d 442 (2d Cir. 1961). The court did not immediately, but ultimately did remand the defendants. The jury was not sequestered until the court began its charge.

[3898]

[A 7] Jury fixing was not an unheard of possibility at the time that Persico IV was being tried. The Hoffa trial was simultaneously going forward. A *fourth* trial could not be halted for immediate investigation of the charges. There would be a grave possibility of mistrial and the prospect of claims by defendants of double jeopardy if a *fifth* trial were to be undertaken. The defendants were already asserting that a fourth trial was subject to such challenge. The court, accordingly, informed the attorneys for the defendants as often—and it was quite often—as they moved for immediate action which invariably was coupled with demands for immediate interrogation of the jury, that it would not risk "poisoning" the minds of the jurors by bringing to their notice matters of which they might not up to that moment have been aware. Instead, the court declared, the proceedings would be deferred until the jury had rendered its verdict. Significantly, no post-verdict applications were made by counsel to have the jury questioned although such procedure was left open to them.

[A 8] Cf. Roviaro v. United States, *353* U.S. 53, *77* S. Ct. 623 (1957) in which the court declared U.S. at p. 59 and S. Ct. at p. 627:

> "What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that

> law. Scher v. United States, 305 U.S. 251, 254, 59 S. Ct. 174, 176, 83 L. Ed. 151; In re Quarles and Butler, 158 U.S. 532, 15 S. Ct. 959, 39 L. Ed 1080; Vogel v. Gruaz, 110 U.S. 311, 316, 4 S. Ct. 12, 14, 28 L. Ed. 158. The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation."

and ibid. at pp. 628 and 629 respectively:

> "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in [3899] protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."

A 9 The case cited was the "trial of Aaron Burr for a misdemeanor, in beginning, setting on foot, and providing the means of, a military expedition against the dominions or territory of the king of Spain." Chief Justice John Marshall presided over the "meetings" of the Circuit Court which with the aid of a jury tried the charge. The verdict was of acquittal, but it was not rendered until the Chief Justice had preliminarily considered and ruled on the question still not yet finally resolved, as to what to do when an accused's demand upon the state to produce for the possible aid it may give to his defense a document encounters head-on a claim by the prosecution that paramount public interest bars disclosure. The writings in controversy were letters written by General Wilkinson to the President of the United States. It is interesting to note that a compromise proposal whereby only Colonel Burr's counsel would be permitted to examine the letters, the U. S. Attorney "depend[ing] on their candor to make no improper disclosures; and if there should be any difference of opinion as to what were confidential passages, the court should decide," was rejected by the defense.

Charging that the procedure contemplated a "secret tribunal" and that they "had a right to hear the letter[s] publicly," defense counsel "united in refusing the inspect anything that was not also submitted to the inspection of their client."

The trial berich with the Chief Justice as its spokesman was able to circumvent the problem by holding that the privilege of nondisclosure was personal to President Jefferson who it was noted did not appear to have asserted it.

A 10 § 3500 was enacted two years after Jencks to cure its "errors."

[3900]

A 11 The Jencks Act unquestionably, among other matters, reinstated the procedure, which the Supreme Court, had explicitly disapproved, of requiring that the subject documents be delivered to the court *before* their turnover to the defendant. The court was again in such event required to conduct an ex parte examination when the U. S. Attorney objected to their qualification as "statements" within the intent of § 3500(e); and again appellate review as to the portions withheld by the trial judge's direction was similarly ex parte, with the defendant excluded from prosecuting an effective appeal, since effectiveness required knowledge of what had not been disclosed.

A 12 Even more disturbing than the Canon is the sentiment of Seneca, Nero's ancient tutor who, in his Medea sagely remarks, "Qui statuit aliquid, parte inaudita altera, aequum licet statuerit, hand aequus fuerit." (He who decides a case without hearing the other side, though he decide justly, cannot be considered just.) If valid and strictly applied, the aphorism the venerable Roman sponsors might render constitutionally dubious the entire Jencks Act in camera procedure, and compel a reinstitution of the Jencks case norms.

APPENDIX C

Judgment of the United States Court of Appeals

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-ninth day of June, one thousand nine hundred and sixty-six.

Present:

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. ROBERT P. ANDERSON,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH F. SCHIPANI,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York, and was argued by counsel.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the Judgment of said District Court be and it hereby is affirmed.

/s/ A. DANIEL FUSARO
Clerk